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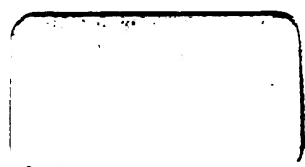
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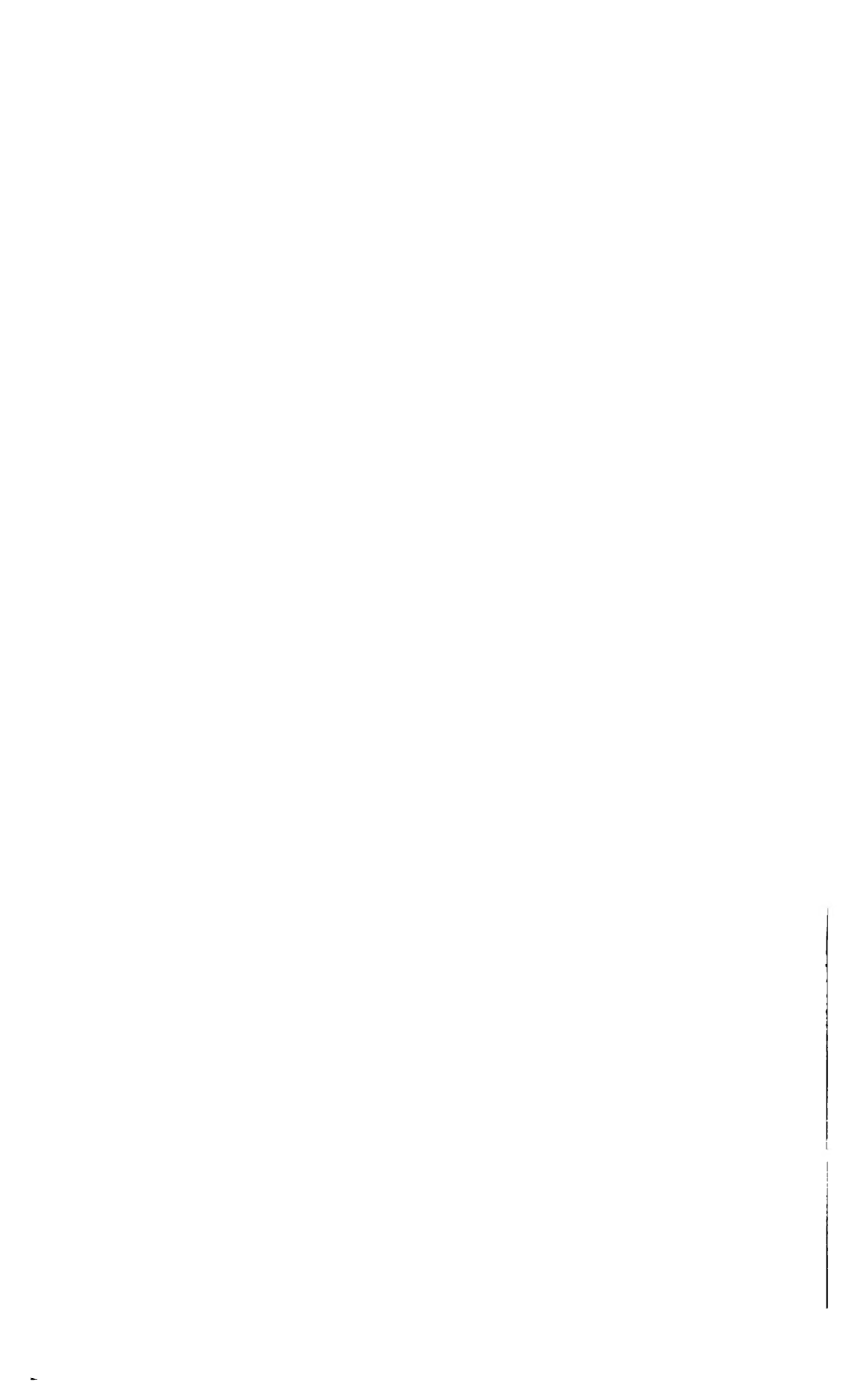
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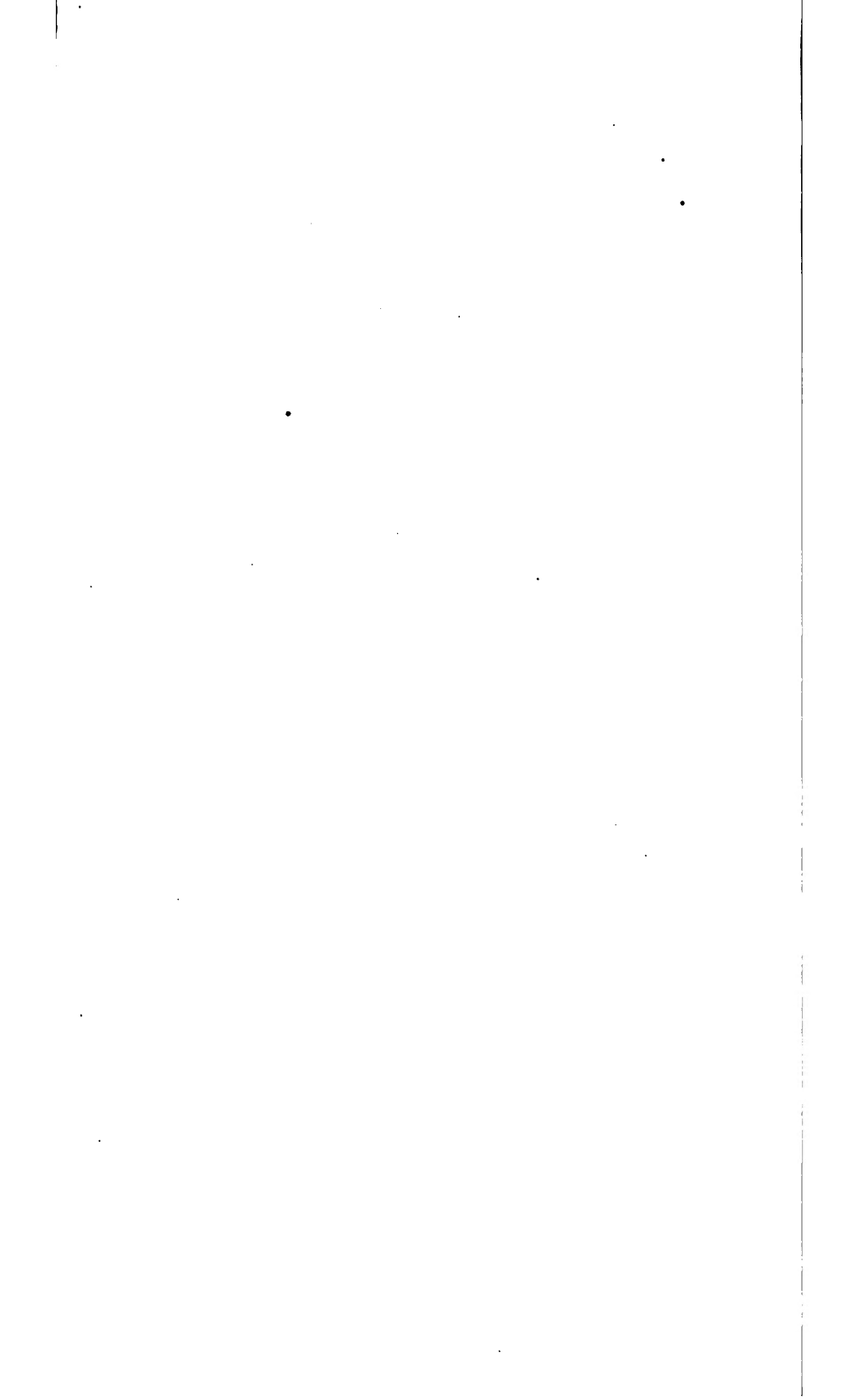
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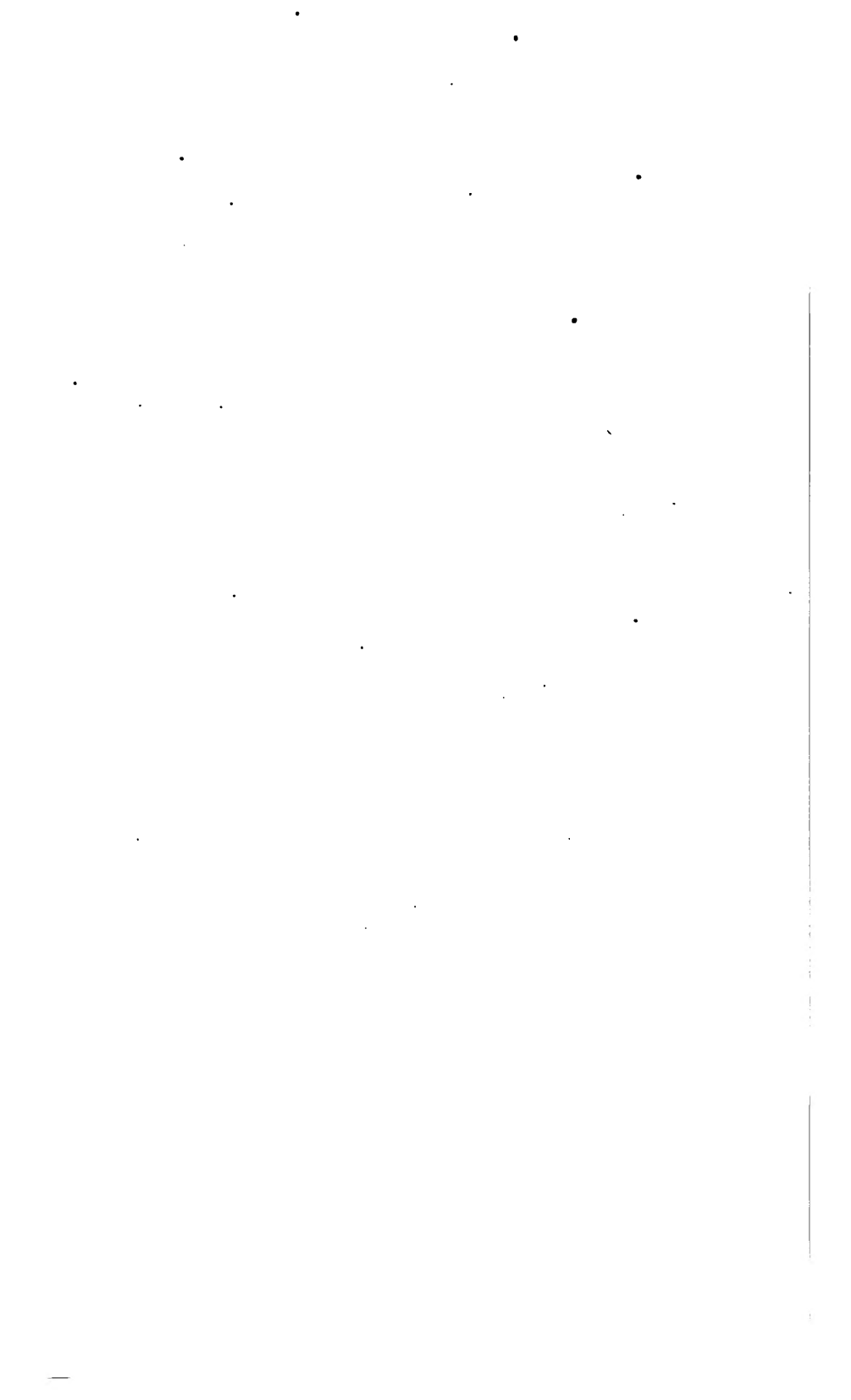


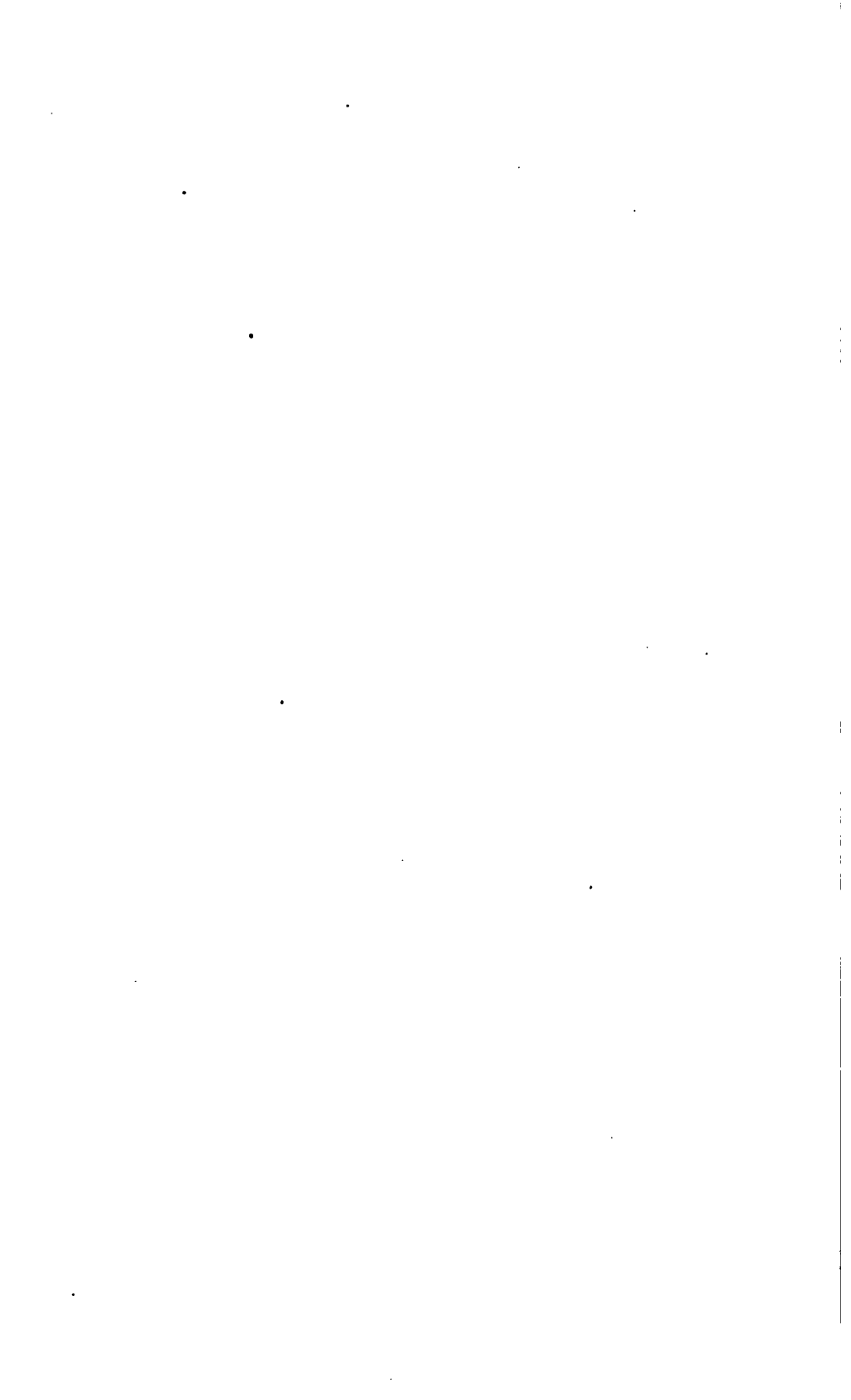


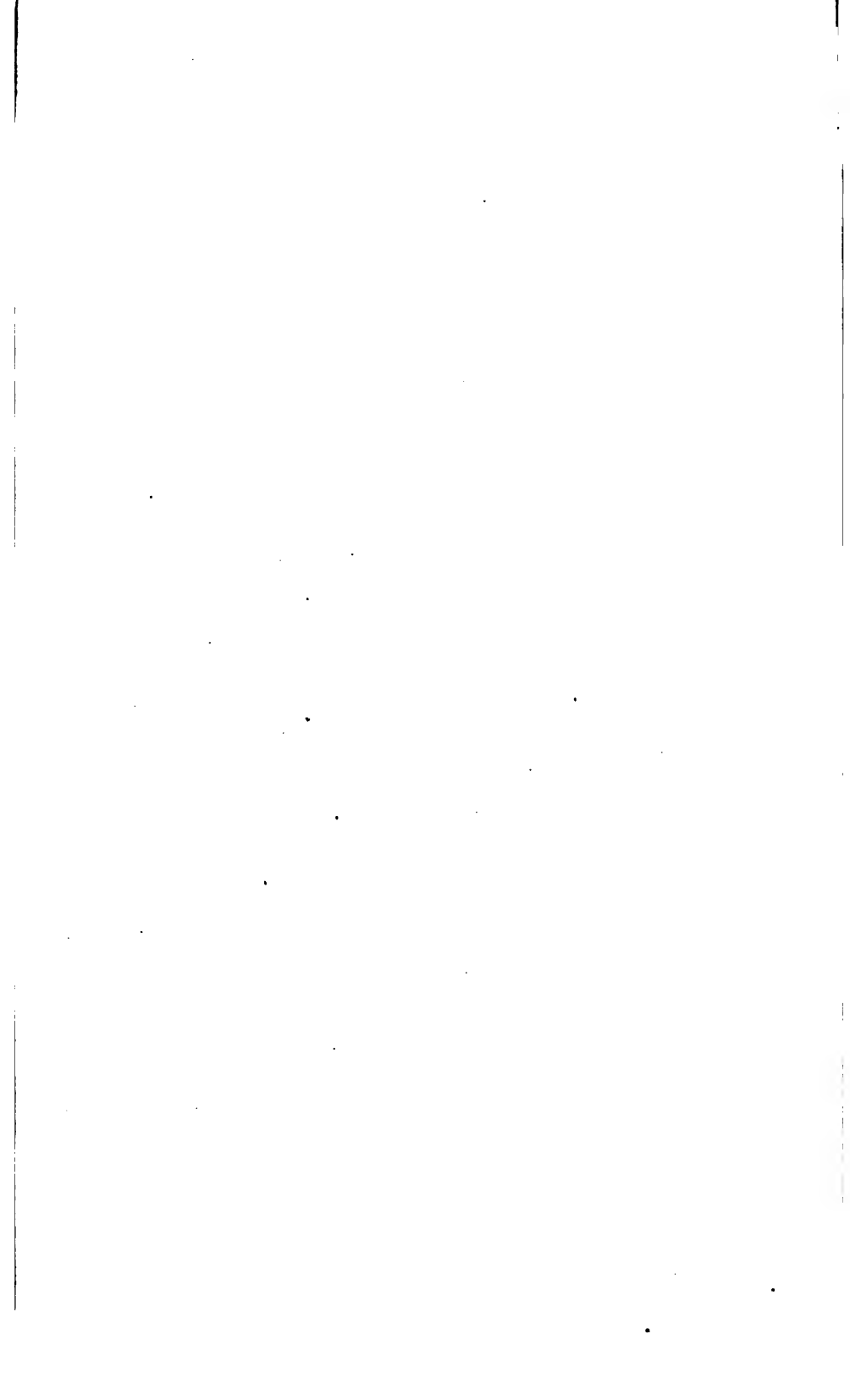












REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

Circuit Court of the United States

FOR THE SECOND CIRCUIT.

BY SAMUEL BLATCHFORD,

AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES.

VOLUME XXII.

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JUDGES
OF THE CIRCUIT COURTS OF THE UNITED STATES
WITHIN THE SECOND CIRCUIT,
DURING THE TIME OF THESE REPORTS.

**SAMUEL BLATCHFORD, ASSOCIATE JUSTICE OF THE
SUPREME COURT OF THE UNITED STATES.**

**WILLIAM J. WALLACE, CIRCUIT JUDGE OF THE SECOND
JUDICIAL CIRCUIT.**

DISTRICT JUDGES.

ADDISON BROWN, SOUTHERN DISTRICT OF NEW YORK.

ALFRED C. COXE, NORTHERN DISTRICT OF NEW YORK.

**CHARLES L. BENEDICT, EASTERN DISTRICT OF NEW
YORK.**

HOYT H. WHEELER, VERMONT.

NATHANIEL SHIPMAN, CONNECTICUT.

ERRATUM.

Page 806, line 8 from bottom, for "case" read "cases."

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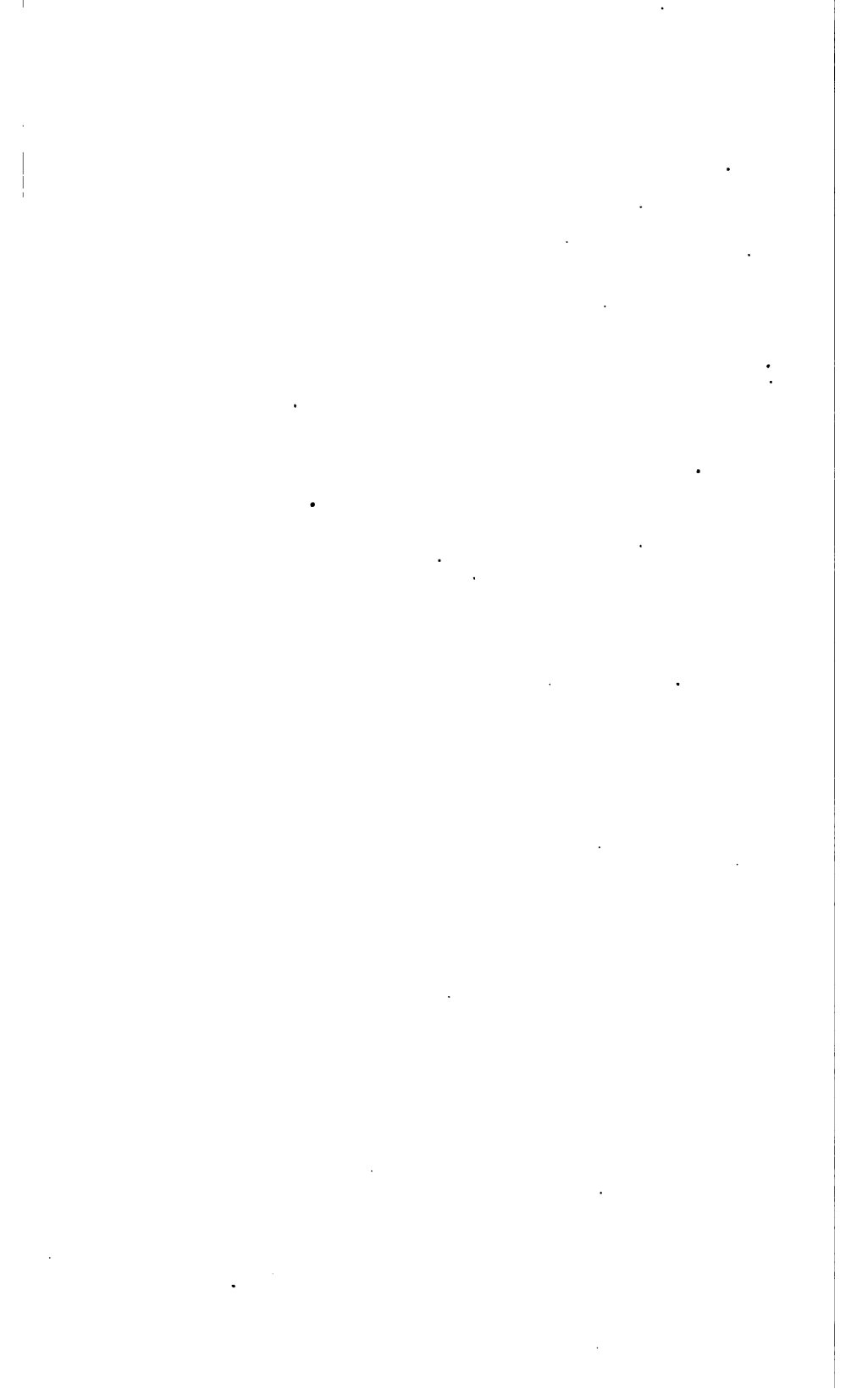
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CIRCUIT COURT REPORTS,

VOL. XXII.



CASES
ARGUED AND DETERMINED
IN THE
Circuit Courts of the United States
WITHIN THE SECOND CIRCUIT.

FREDERICK FRELINGHUYSEN, AS RECEIVER, &C.

vs.

THEODORE F. BALDWIN.

To authorize the removal of a suit from a State Court, under subdivision 3, of section 639, of the Revised Statutes, the requisite diversity of citizenship must exist both when the suit was begun and when the petition for removal is filed.

(Before WALLACE, J., Southern District of New York, January 4th, 1884.)

WALLACE, J. Since the decision in *Miller v. Chicago, B. & Q. R. R. Co.*, (3 *McCrary*, 460,) the Supreme Court, in *Gibson v. Bruce*, (108 *U. S.*, 561,) has construed the language of sections 2 and 3 of the removal Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) to require, as a condition of removal, that the requisite diversity of citizenship exist both when the suit was begun and when the petition for removal is filed. That decision seems to control the present case, where the removal was procured by the plaintiff under subdivision 3 of section 639 of the Revised Statutes,

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the parties both being residents of New Jersey when the suit was brought, but the defendant having removed subsequently to New York. The language of this subdivision is substantially similar to that of section two of the Act of 1875, so far as it relates to the question now under consideration; and the reasons stated in the opinion of the Court in *Gibson v. Bruce* apply with equal force to a removal under subdivision 3 of section 639.

The motion to remand is granted.

Henry Schmidt, for the motion.

William A. Beach, opposed.

CHARLES BALFOUR, ASSIGNEE, &C.

vs.

HAYDEN W. WHEELER AND OTHERS. IN EQUITY.

B., in Ohio, 11 months before the filing against him of a petition in bankruptcy, gave to a creditor a cognovit note, payable in 2 months, under which the creditor was authorized, at any time after the note matured, to enter a judgment against B., for the amount of the note. The judgment was entered 42 days before the petition in bankruptcy was filed, and on it the personal property of B. was taken, on execution: *Held*,

- (1.) The mere giving of the cognovit did not constitute a procuring by B. of the taking of his property at the time it was taken, all the other conditions of an illegal preference existing;
- (2.) On the evidence, B. procured his property to be taken within 2 months before the filing of the petition.

(Before WALLACE, J., Southern District of New York, January 4th, 1884.)

WALLACE, J. The appellants seek to reverse a decree of the United States District Court for the Southern District of

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New York, (15 *Fed. Rep.*, 229,) declaring the seizure and sale by them of a stock of merchandise belonging to one Benton, upon an execution in their favor against Benton, void as against Benton's assignee in bankruptcy.

August 1st, 1877, at Cleveland, Ohio, Benton executed and delivered to the appellants a cognovit note, for the sum of \$9,566, payable in two months, which, under the laws of Ohio, authorized them, at any time after the maturity of the note, to enter a judgment for the amount and costs, against Benton. June 7th, 1878, the appellants caused a judgment to be entered on this note, and an execution to be issued, and levied upon Benton's personal property, and, four days thereafter, such property was sold and purchased by the appellants. July 19th, 1878, the creditors of Benton filed a petition against him for an adjudication of bankruptcy, and thereafter he was adjudged a bankrupt, and the complainant was appointed his assignee in bankruptcy, and received an assignment of his estate.

It is perfectly plain, upon the proofs, that Benton and the appellants sustained intimate confidential relations towards each other, from a time considerably anterior to the making of the cognovit note, down to the time of Benton's bankruptcy, and that they not only knew his financial situation, but were his advisers, and he was their willing instrument, during all this period. The proofs show, satisfactorily, that Benton was in contemplation of insolvency when he made the cognovit note; that he made it with a view to give a preference to the appellants, by means of a judgment and execution, over his other creditors, whenever after its maturity the appellants might choose to proceed; that he continued to be in contemplation of insolvency, from the time he made the note until he was adjudged a bankrupt; and that, when they took the note, and from that time until they seized Benton's property upon the execution, the appellants had reasonable cause to believe Benton to be insolvent, and knew that if they seized his property upon execution they would obtain a preference over his other creditors, and also knew that he intended to

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suffer them to seize his property in order that they might obtain such a preference. Upon this state of facts, the only question which the case presents is, whether the bankrupt procured or suffered his property to be seized on the execution, within two months of the filing of the petition in bankruptcy against him. Unless he did, one of the conditions precedent to the right of the assignee in bankruptcy to set aside the preference does not exist.

The cognovit note was made eleven months before the petition in bankruptcy was filed. Although it gave a continuing authority to enter the judgment and issue the execution, the authority was given when the note was given, and not when the judgment was entered. It was the opinion of the learned District Judge, in the Court below, that the authority speaks from the time it is carried into effect, so as to constitute a procuring of the seizure of the bankrupt's property at that time. This conclusion cannot be reconciled with the explicit declaration of the Supreme Court, in *Clark v. Iselin*, (21 Wall., 375.) In that case the Court, speaking through Mr. Justice Strong, says: "It is true the judgment is entered by virtue of his" (the debtor's) "authority, an authority given when the confession was signed. That may have been years before, or, if not, it may have been when the debtor was perfectly solvent. But, no consent is given when the entry is made, when the confession becomes an actual judgment, and when the preference, if it be a preference, is obtained. The debtor has nothing to do with the entry. As to that he is entirely passive. Ordinarily, he knows nothing of it, and he could not prevent it if he would. It is impossible, therefore, to maintain that such a judgment is obtained by him *when* his confession is placed on record."

It does not follow, however, that the assignee cannot successfully assail the preference because the confession of judgment was made by Benton more than two months before the filing of the petition in bankruptcy against him. Although the confession was authorized by Benton at that time, the preference was not obtained until his property was seized up-

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on the execution ; and, if within the two months he suffered or procured his property to be so seized, the decree of the District Court should be affirmed. He may have done all on his part that was necessary to enable the appellants to obtain an illegal preference, before the two months began to run, but he may, also, have facilitated the seizure within the two months ; and, if this is the case, and he was then insolvent, and intended to give them a preference, and they knew his intent, all the conditions are satisfied which must coexist to enable the assignee to set aside the preference. If it is necessary to find, upon the evidence, that Benton procured the seizure of his property within the two months, that conclusion may be reached, without serious difficulty, by applying the rule announced in *Wilson v. City Bank*, (17 Wall., 473.) That was a case where a creditor had recovered a judgment by default, in an adversary suit brought against the judgment-debtor, and the latter, being insolvent at the time, and having committed an act of bankruptcy to the knowledge of the creditor, and not having taken any steps to defeat the levying of an execution, the question was whether the levy was invalid as against an assignee. It was held that something more than passive non-resistance on the part of the debtor was necessary to show that he had procured the seizure of his property, but it was also declared, that very slight circumstances tending to show the existence of an affirmative desire on the part of an insolvent debtor to give a preference, may, by giving color to the whole transaction, render the lien void. The circumstances in the present case are not slight, but are cogent to imply the existence of an affirmative desire on the part of Benton to prefer the appellants, from the time the cognovit note was made to the time when his property was sold on the execution. As has been stated, it was his original purpose to permit the appellants to obtain a preference at the exigent moment. As early as in January, 1877, they were his confidential creditors, holding a secret security for their debt, in the hands of one Ingersoll, an attorney at Cleveland, who had been Benton's friend and attorney for many years. Benton

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was then financially embarrassed, but the appellants were willing to assist him in obtaining an extension from his creditors. While negotiations for an extension were being had with his creditors, Benton was consulting Ingersoll, at the appellants' suggestion, in their interest. In February, an extension of eighteen months was effected, by the terms of which Benton was to pay monthly instalments to his creditors, and the appellants released their security. After one instalment had been paid to the appellants, and in July, 1877, they consented that he might omit paying them but might continue paying the other creditors. The correspondence between Benton and the appellants shows that at this time there was a perfect understanding between them, that the appellants should be secure in any contingency. It was to carry out this understanding that the cognovit note was placed by Benton in Ingersoll's hands, on the 1st day of August. The existence of this note was not divulged, and Benton kept on in business, buying of his other creditors on credit as before, but receiving goods from the appellants only on commission, until the June following, when his affairs became critical, and Ingersoll caused judgment to be entered on the cognovit, and execution to be levied on his stock of goods. Four days thereafter, Benton signed a consent for a private sale of the goods. The whole stock was bought in by Ingersoll for the appellants, at a price somewhat below the amount of the execution, and Benton was placed in charge, and continued the business, as their agent. All the indicia which characterize a transfer by an insolvent debtor to a favored creditor are present in this transaction. They are as well defined at the final consummation of the proceeding as at its inception. The confidential relations between the parties; their co-operation for each other's benefit; the selection of an attorney who was in the confidence of both parties; the secrecy, when secrecy was expedient, and the promptitude when secrecy was no longer possible; the private sale; and the subsequent continued possession of the property by the former owner, are circumstances too significant to leave any room for doubt that there was a

The Pegasus.

perfect understanding between the parties to the sale, from the beginning to the end.

The decree of the District Court is affirmed.

James H. Hoyt and *Charles S. Davison*, for the plaintiff and appellee.

Roscoe Conkling and *James Crombie*, for the defendants and appellants.

THE PEGASUS.

In a case of collision between a barge, towed at the starboard side of a steam-tug, (both owned by the libellant,) and a steamer, the tug was held in fault for persisting in starboarding, when the green light of the steamer, which was on the starboard hand of the tug, had been shut out, for a long time, after both her side lights had been seen at one time, and when a signal of two whistles, given by the tug to the steamer, had not been answered by her, the usual course of the steamer, to make her landing, being known to the tug; and the steamer was held in fault for failing to see the lights of the tug.

The District Court having dismissed the libel, this Court, on an appeal by the libellant, divided the damages, and allowed no costs to either party in the District Court, but allowed to the libellant costs in this Court.

(Before WALLACE, J., Connecticut, January 7th, 1884.)

THIS was a libel *in rem*, in the District Court, for a collision. That Court dismissed the libel. (15 *Fed. Rep.*, 921.) This Court found the following facts: "About half-past ten o'clock in the evening of July 21st, 1882, the steam-tug Whipple, having in tow the barge Allandale, both owned by the libellant, lashed to her starboard side, left Jersey city bound for Pier 8, East River. The tug and tow had all their regulation lights properly set and brightly burning. The night was dark, but the lights were easily visible for a distance of over a mile, but the green and red lights of the tug were obscured to the

The Pegasus.

view of any vessel bearing on the starboard of the tug, by the barge. The tide was running flood. As the tug and tow passed abreast of Pier 1, North River, about one hundred yards off in the river, their officers saw the colored lights of the Pegasus, an iron steamboat, then off Castle William, about a mile distant. At that time the Whipple was on a course about south, and the Pegasus was on a course about north, or meeting respectively head and head. Thereupon, the tug and the Pegasus both commenced to swing to the eastward, into the East River, upon courses converging towards each other, the tug to reach Pier 8, and the steamer, as was her uniform custom when there was a flood tide, to make a sheer, on a northeast course, to facilitate her landing on the south side of her pier. At this time the Whipple lost the green light of the Pegasus, and saw only her port light, but blew two whistles, to inform the Pegasus that she wanted to go on her starboard side, and, without getting any reply, continued under a starboard wheel, without giving any further signal. The Pegasus continued on her northeasterly sheer, until she was about a fourth of a mile from her landing place, when she starboarded her helm, and swung to the westward, as she usually did, in order to make her customary landing. She did not see the tug or barge until too late to avoid a collision. The collision occurred at a point about three hundred yards southwest of the upper bath-house on the Battery. The barge was seriously injured by the blow of the Pegasus. The Pegasus was going at a speed of about twelve miles an hour until she starboarded her helm, when she slowed down to four or five miles an hour. The speed of the tug was about three miles an hour all the time. The Pegasus did not hear the signal of the tug, nor did she see the lights of the tug, at any time, until the collision. The captain of the tug knew the course the Pegasus was accustomed to take in order to make her landing, but assumed that, as he had signalled her that he was going on her starboard side, she would conform her movements accordingly."

Beebe & Wilcox, for the libellant.

W. S. Macfarlane, for the claimant.

The Pegasus.

WALLACE, J. The proofs in this case fully sustain the conclusions of the Court below, as expressed in the opinion of the District Judge, except as to his finding that there was no fault or negligence on the part of those in charge of the Pegasus, in not seeing the tug and barge until too late to avoid a collision. The learned District Judge states, in his opinion, that he cannot tell why the two vertical white lights on the flag-staff of the tug, and the barge lights, were not visible to the steamer, although they were burning brightly. The reason why the red and green lights on the tug were not seen is obviously, as he finds, because they were hidden by the barge from the time the tug swung, under her starboard wheel, for the East River, thus bringing the barge between her and the Pegasus. The two vertical white lights were suspended on the flag-staff of the tug, one about a foot above the other, and the lower light was twenty-one feet above the water. It is possible that these lights may have been somewhat obscured from the Pegasus by the pilot house of the barge, at times, while the vessels were approaching each other, but, in the constantly shifting positions of the vessels, they could not have been hidden continually; and those in charge of the Pegasus do not rely upon any such theory, but insist that there were no lights on the tug, and that none were to be seen when the vessels collided. These lights ought to have been seen during the time the Pegasus was on her northeast course, which covered three-quarters of a mile, and, in the absence of any fact to explain why they were not seen, there can be no other rational conclusion except that it was owing to some relaxation of vigilance on the part of the Pegasus. Precisely where this negligence should be located is not important; it suffices that there was failure to see the lights when they were plainly visible to those in charge of the steamer, if they had used due diligence.

Agreeing with the District Judge that the tug was in fault, and that the conduct of her captain was greatly negligent in keeping under his starboard wheel when the green light of the Pegasus had been shut out from him for so long a dis-

Pentlarge v. Pentlarge.

tance, and in attempting to keep his course when his signals had not been answered, and when he had reason to know that the Pegasus was making for her usual landing, nevertheless, the collision was not attributable solely to the tug. As the District Judge states in his opinion: "It is manifest, that, if the Pegasus had seen, or ought to have seen, the lights of the tug and barge, her management was negligent, and she was in fault."

In such a case, the damages must be apportioned between the offending vessels. Even gross fault committed by one of two vessels approaching each other from opposite directions does not excuse the other from observing every proper precaution to prevent a collision; and when, if such precaution had been observed, the collision would have been avoided, the loss should be divided. (*The Maria Martin*, 12 Wall., 31.)

A decree is accordingly ordered, dividing the loss, with a reference to a Commissioner to ascertain the amount. No costs are allowed to either party as against the other, in the Court below, but costs of the appeal are awarded to the libellant.

RAFAEL PENTLARGE

vs.

FREDERICK PENTLARGE AND WILLIAM R. BRESTON. IN EQUITY.

In a suit in equity, brought under § 4,918 of the Revised Statutes, to obtain a decree declaring void, as an interfering patent, a patent issued later than the plaintiff's patent, the defendants cannot, by a plea, set up, as a defence, that the invention described in the plaintiff's patent was described in a patent issued and published prior to the time of the plaintiff's invention.

(Before BENEDICT, J., Eastern District of New York, January 22d, 1884.)

Pentlarge v. Pentlarge.

BENEDIOT, J. This is a motion on the part of the plaintiff to strike from the files a plea interposed by the defendants; or, otherwise, that the plea stand as an answer. By this motion the question has been raised whether the fact stated in the plea must not be brought before the Court by answer and not by plea.

This action is a proceeding taken by virtue of § 4,918 of the Revised Statutes, where provision is made for a suit in equity whenever there are interfering patents. The bill, after setting forth a certain patent issued to the plaintiff, as the first inventor of the invention therein described, charges that the defendants have a patent issued subsequent to the plaintiff's patent, and for the same invention, which patent the plaintiff prays may be declared void, pursuant to the provisions of § 4,918.

To this bill the defendants have interposed a plea in bar of the action, in which plea they say that the invention described in the plaintiff's patent was described in an English patent, issued, in 1855, to William Rowland Taylor, and printed and published and filed in the United States Patent Office prior to the time of the plaintiff's alleged invention, by reason whereof the plaintiff's patent is void, and does not entitle him to maintain any action based thereon; and the question arises, whether the subject-matter of this plea can be brought before the Court by plea. If a decision of this question of practice were necessary on this occasion, it might be difficult to assign any substantial reason why, if the facts stated in the plea respecting the English patent be fatal to the plaintiff's right of action, such facts may not be presented by plea, provided the defendants elect, as these defendants have done, to present them in that way, and not by answer. But, a decision of that question is not called for here, inasmuch as the argument of the plea, which was had without prejudice to the question raised by the motion, has satisfied me that the plea must be overruled, upon the ground that the fact pleaded, if true, is immaterial in an action like the present.

This proceeding is statutory, instituted by virtue of § 4,918.

Pentlargo v. Pentlargo.

Such a proceeding, as I conceive, has for its sole object a determination of the question of interference, and of priority of invention. It is, by the terms of the statute, limited to cases of interfering patents, and it is only in case interfering patents are found to have been issued that the Court is empowered to "adjudge and declare either of the patents void." The implication is, that, when the patents are found to interfere, the result of the proceeding shall be a decree making void the patent issued to the later inventor. But, if the defendant in such an action may attack the plaintiff's invention upon any ground which the statute permits to be set up by answer in an action for infringement, it would often result that the proceeding would fail to secure an adjudication of the question of interference, and so the proceeding be rendered futile for the purpose which the statute intended should be accomplished. Such would be the result in this case. By their plea the defendants admit the averment of the bill, that the plaintiff's patent is for the same invention as that described in the defendants' patent, and, also, that the plaintiff was the first inventor.

Upon these facts, according to the statute, the plaintiff should have a decree declaring the defendants' patent void; and yet, if the plea be allowed, the plaintiff will obtain no adjudication upon this question, while the defendants will obtain a decree declaring the plaintiff's patent void, and leaving their own to stand; and this, too, when the facts stated in their plea, if true, taken in connection with the facts stated in the bill, which are admitted, show the defendants' patent to be also void.

The defendants, then, by their plea and their admission, taken together, show their own patent void, and upon that showing claim a decree declaring the plaintiff's patent void and leaving their own unaffected. Such a result cannot, as it seems to me, be permitted. According to my understanding of the statute, the proceeding permitted thereby is to be confined to a determination of the questions of interference and priority; and, if I am right in this, the issue tendered

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by the plea is immaterial. This conclusion has not been reached without giving careful consideration to the opinion expressed by Treat, J., in *Foster v. Lindsay*, (3 Dill. 126,) where the opposite conclusion was arrived at. With all my respect for that distinguished Judge, I am unable to agree with him.

An order will, accordingly, be entered, overruling the plea.

Preston Stevenson, for the plaintiff.

Brodhead, King & Voorhies, for the defendants.

MARIE A. REAY, EXECUTRIX, &C.

vs.

SAMUEL RAYNOR AND OTHERS. IN EQUITY.

A patent was re-issued. Afterwards, and before it expired, a suit in equity was brought alleging infringement of the original patent, and not referring to the re-issue. After the patent expired, the bill was, by consent, amended to cover the re-issue instead of the original: *Held*, that the Court had jurisdiction, in equity, of the case made by the bill as amended.

Where the original patent described a part of a machine, but stated no use for it, and made no claim in regard to it, and the re-issue stated the use and effect of the part, and made a claim in respect to it: *Held*, that the re-issue showed an invention different from the original, and that the claim was void.

It was void for the further reason that the re-issue was taken out more than three years after the original.

The invalidity of that claim does not necessarily render invalid claims of the original which are reproduced in the re-issue.

The function or mode of operation of machinery is not patentable apart from the machinery.

Where an inventor merely sees infringing machines, without claiming that they infringe, and does not lead the defendant into any expenditure or course of

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conduct, by his silence when he ought to have spoken, which the defendant would not have made or followed if the inventor had spoken, he is not debarred from the right to an injunction.

It being held that the defendant infringed certain claims by the use of machines made during the life of the patent, an injunction was granted, after the patent had expired, on the bill as one filed during such life, to restrain the continued use of the parts of those machines which embraced those claims.

(Before WHEELER, J., Southern District of New York, January 23d, 1884.)

WHEELER, J. The testator of the oratrix was the owner of re-issued letters patent No. 2,529, granted March 26th, 1867, upon the surrender of original letters patent No. 39,702, granted to him August 25th, 1863, for improvements in envelope machines, which would expire August 25th, 1880. The bill was brought June 12th, 1880, upon the original patent, without referring to the re-issue, to restrain the use of machines alleged to be infringements, and for an account. No motion was made for a preliminary injunction. An answer was filed setting forth the re-issue, August 16th, 1880, the oratrix moved to amend the bill, and, September 22d, 1880, it was, by stipulation, amended to cover the re-issue in place of the original. The defendants now move, on the authority of *Root v. Railway Co.*, (105 U. S., 189,) that the bill be dismissed for want of jurisdiction in equity, because the patent had expired before the amended bill was filed, upon which only the oratrix could have any equitable relief. (*Dowell v. Mitchell*, 105 U. S., 430.) The infringement is solely by the use of machines made before the bill was brought and continued ever since, and would be covered by the general allegation of infringement made in both the original and amended bills, if filed during the term of the patent, but the continued use after the expiration of the term would not be so covered by that general allegation, in a bill filed after the expiration; special allegations setting forth that the machines were infringements when made would be necessary. (*Root v. Railway Co.*, 105 U. S., 189; *American Diamond Rock Boring Co. v. Rutland Marble Co.*, 18 Blatchf. C. C. R., 147.) It is urged, for the oratrix, that the amended bill is to

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be considered, for this purpose, as if the original had been as it is amended when filed, and, for the defendants, that it is to be considered as if it had been filed as an original bill when it was filed. The oratrix had the re-issue when she brought her original bill, and must have intended to bring her bill upon the patent which she had and not upon one which she did not have. Under these circumstances, it would have been competent for the Court to allow the amendment. That which could be done by the Court without consent could well be done by the parties by consent. When done, it made the bill as it should have been at first, and in effect as if it had been so at first. Such amendment only was necessary as would make the bill what it should have been to be good when brought, not what would have been necessary to make it what it would have to be to be good at some other time. If the oratrix has shown a case for any equitable relief, she is, upon all the decided cases, entitled to have the bill retained for that, and such cognate relief as is necessary to do complete justice. (*Dowell v. Mitchell*, 105 U. S., 430.)

The defendants set up that the re-issue is too broad for the original. The original showed and described two arms, extending from a table in the interior of the machine, under which the envelope-blank is made to pass on its way to a creasing box in the rear, one on each side of the box, to, or nearly to, a line with the rear side of the box. No use for these arms was stated. In the re-issue, these arms are described as applied in such position that they extend parallel to the edges of the creasing box, with their lower edges level with, or rather below, the top edge of the box, so as to bear down on the ends of the blanks and hold them in position on the box to be creased, and as secured to the table or any other fixed part of the machine. No other reference to the table in connection with them is made. No claim was made in the original in respect to them. They are the subject of the new fourth claim. The original showed these arms only as extensions from the table. Their height in respect to the creasing box was not shown with accuracy, otherwise than by reference

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to the table. As no function was ascribed to them, their position could not be inferred from what they were to do. When they were described as in a certain position with reference to the creasing box instead of the table, and as attachable to some other part of the machine when they would not be extensions of the table, and an office was ascribed to them, an invention different from that in the original was shown. This claim was too broad to be added at any time, and, therefore, void. (*Gill v. Wells*, 22 Wall., 1; *Russell v. Dodge*, 93 U. S., 460.) Besides, the re-issue was taken out more than three years after the original, and would seem to be, for that reason, unseasonable and invalid. (*Miller v. Brass Co*, 104 U. S., 350.)

That this claim is invalid does not necessarily render the other claims of the original, reproduced in the re-issue, invalid. (*Schillinger v. Greenway Brewing Co.*, 21 Blatchf. C. C. R., 383; *Gage v. Herring*, 107 U. S., 640.) In the first claim in both, what is called a slide in the original is called a carrier in the re-issue. The description of it or of its operation is not changed. The claim is, in substance, the same in both.

Only the first, second, fifth, seventh, tenth and twelfth claims, besides the fourth claim, of the re-issue, are said to be infringed.

The fifth claim is merely for feeding the blanks under the table which supports the gum-box, instead of over it. The machinery described, some of which is the subject of other claims, does feed the blanks under that table. The claim is merely for that function or mode of operation of that machinery. As such, this function, or mode of operation, does not seem to be patentable, apart from the machinery. (*McKay v. Jackman*, 20 Blatchf. C. C. R., 466.)

Want of novelty of the other claims is alleged, and infringement of them is denied. Envelope machines were in use before this invention. This inventor was entitled to, and claimed, a patent only for his improvements. Slides or platforms to hold envelope-blanks, lifters or pickers to receive

gum on their faces and take it to the proper place on the blank, and by its adhesiveness to lift them so they could be taken by carriers or conveyors, carriers or conveyors to take them to a creasing box, creasing boxes to crease them, and folding apparatus to fold them, were all then known.

The seventh claim is for a balance weight connected with this form of conveyor; and the twelfth for ribs on the face of the plunger which works in the creasing box and presses the envelopes after they are folded. The defendants are not found to make use of either of these devices, or what is the equivalent of either, in the working of this invention.

In this invention, the lifters or pickers, after receiving gum on their faces, fall by their own weight upon a pack of blanks on a movable slide, which receives the pack and carries it to, and holds it in, the proper place, and lift the upper blank until it is disengaged by the table supporting the gum-box, and taken by the conveyor under the table, and steadied by it to the creasing box. This combination of the movable slide and falling lifters, and arrangement of the table and conveyor, form the subjects of the first and second claims. Also, a cam and roller connected with the plunger bring its face to a pressure upon the envelope, to stick its folds firmly after it has been folded. This cam and roller, in combination with the plunger, are the subjects of the tenth claim. Careful and repeated examinations of the machines and patents put in evidence to show anticipations and want of novelty have failed to discover such combinations and arrangements as those covered by these three claims. The falling lifters, the arrangement of the table over the conveyor to steady the blank, and the combination of the cam and roller with the plunger, appear to be new with this invention. These claims, therefore, appear to be valid. The defendants' machines have the movable slide to carry the pile of blanks to the proper position under the pickers, the falling pickers, and the conveyor arranged under the table supporting the gum-box; they also have the cam and roller pressing the support of the envelope against the folded envelope, instead of the plunger against it,

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to press it. The support is the equivalent of the plunger, for this purpose. Therefore, the defendants are found to infringe these three claims, by the use of the machines made during the life of the patent, in violation of the rights of the inventor; and it appears that they would continue the use if not restrained.

It is claimed that the inventor so conducted himself, by seeing machines similar to those of the defendants made without claiming that they infringed his patent, that neither he nor the oratrix, as his personal representative, could have any equitable right to restrain their use. It does not appear, however, that he led the defendants into any expenditure or course of conduct, by his silence when he ought to have spoken, which they would not have made or followed if he had spoken. The fact of the patent was open to them, as well as known to him. They could respect it or take the risk of having what they did turn out to be an infringement. They chose the latter course, and he does not appear to have been responsible for their choice. The oratrix appears to be entitled to an injunction to restrain the use of so much of these machines as were infringements when they were made. (*Crossley v. Derby Gas Light Co.*, *Webst. Pat. Cas.*, 119 and 4 *Law Jour.*; *N. S., Chan.*, pt. 1, 25; *American, &c., Co. v. Sheldon*, 18 *Blatchf. C. C. R.*, 50; *Curtis on Pat.*, § 436.) The right to an account for past infringement follows.

Let there be a decree that the first, second, and tenth claims of the patent are valid and have been infringed, and for an injunction against the use of such parts of machines as were made in violation of those claims, and for an account, with costs.

Arthur V. Briesen, for the plaintiff.

Stephen D. Law and *John Van Santvoord*, for the defendants.

LOUIS DRYFOOS vs. WILLIAM WIESE. IN EQUITY.

Re-issued letters patent, No. 9,097, granted, February 24th, 1880, to Louis Dryfoos, assignee of August Beck, for an improvement in quilting machines, the original patent, No. 190,184, having been granted May 1st, 1877, and re-issued as No. 8,063, January 29th, 1878, in so far as they claim, in effect, the combination of the gang of needles and cloth-plate with any feeding mechanism which would reach across the cloth and feed the long side faster than the other, claim an invention not shown in the original, and, except as to the mechanism shown in the original, beyond the invention in every way, and are invalid.

Such invalidity does not avoid a new claim in the first re-issue, brought forward into the second re-issue; but that claim is not infringed.

(Before ~~WHEELER~~, J., Southern District of New York, January 24th, 1884)

WHEELER, J. This suit is brought upon re issued letters patent No. 9,097, granted, February 24th, 1880, to Louis Dryfoos, assignee of August Beck, for an improvement in quilting machines. The original was No. 190,184, dated May 1st, 1877. It was re-issued as No. 8,063, dated January 29th, 1878, and surrendered for the re-issue in suit. The improvement was, and is stated in the original and re-issues to be, for improvements on the quilting machine shown in letters patent No. 159,884, dated February 16th, 1875, granted to the same inventor. That machine was for quilting by gangs of needles in zigzag parallel lines, and was fed by cylindrical rolls having an intermittent rotary motion, which would move the cloth while the needles were out of it, and could be arranged to feed in straight lines, direct or oblique. The original of the patent in suit showed different mechanism for actuating the feed rolls, so that the length of stitch could be varied at pleasure, and conical rolls having an intermittent motion to feed the conical bodies of skirts and skirt borders in a circular direction, when the needles were out of the cloth, as well as cylindrical rolls for straight goods, and other improvements upon other parts of the machine, and had claims for the feed mech-

anism, and improvements upon the other parts of the machine, but none for the conical feed rolls. The first re-issue further described the conical feed rolls as made of such taper as to conform to the shape of the skirt or border to be quilted, and claimed the combination of the series of needles with the conical feed rolls acting intermittently, in place of one of the other claims. The re-issue in suit still further describes the conical feed rolls as the embodiment of a feed device which extends substantially throughout the width of the conical strip of goods, and, as it departs from the shorter curved edge and approaches the longer curved edge, is adapted to have a proportionately increased range of feed-movement, so that it will feed the conical strip of goods in the requisite curved path, evenly and without any injurious strain or drag, and further claims the combination with the gang of sewing mechanisms, and the cloth-plate which supports the goods under them, of a feed device operating intermittently in the intervals between the formation of the stitches, which extends and operates substantially across the conical strip of goods, and which, as it departs from the shorter curved edge, and approaches the longer curved edge, of the goods, is adapted to have a proportionately increased range of feed-movement.

The defendant is engaged in using a quilting machine for quilting conical goods, having a gang of needles, and short cylindrical feed-rollers at each edge of the goods, which they feed in a circular direction, by moving at different rates of speed constantly, the needles having a forward movement corresponding to that of the cloth while in it; and, also, one with a four-motion feed, which is capable of feeding in a circular direction, by lengthening the feed at the longest edge of the goods, but is not shown to have been so used, or intended to be so used. The validity of the re-issue, and infringement of it, if valid, are denied.

Beck well appears to have meritoriously invented effective means for giving circular direction to the feed of quilting machines having gangs of needles for quilting several parallel seams. He set forth these means in the specifications and

drawings of his original patent, and seems to have been well entitled to then have a patent for them, and for the combination of the mechanism with the gang of needles. But he does not appear to have been entitled to a patent for merely giving such direction to such feed-motion, apart from the mechanism, nor to the process of operation of his mechanism for giving such direction. (*McKay v. Jackman*, 20 *Blatchf. C. C. R.*, 466.) Neither could he claim the combination of mechanism not then known, or its processes, with the needles. He invented his own mechanism, and the combination of that with the co-operating parts of the machine, and nothing more; and seems to have been entitled to a patent for those and no more. The first re-issue was within a few months of the original, and before others appear to have done anything in that region of invention, and seems to have been well enough. (*Meyer v. Goodyear, &c., Co.*, 20 *Blatchf. C. C. R.*, 91; *Hartshorn v. Eagle Shade Roller Co.*, 18 *Fed. Rep.*, 90.) The second re-issue was more than two years after the original, but, whether too long after or not, was, in effect, for the combination of the gang of needles and cloth-plate with any feeding mechanism which would reach across the cloth and feed the long side faster than the other. This was, clearly, beyond the invention shown in the original, and, except as to the mechanism shown in the original, beyond the invention in every way. This claim of the re-issue is, therefore, wholly invalid. (*Wing v. Anthony*, 106 *U. S.*, 142; *James v. Campbell*, 104 *U. S.*, 356.) The new claim of the first re-issue brought forward into the second, being valid in the first, is not avoided by the invalid claim of the second. (*Schillinger v. Greenway Brewing Co.*, 21 *Blatchf. C. C. R.*, 383; *Gage v. Herring*, 107 *U. S.*, 640.) The orator appears, therefore, to be entitled to a monopoly of the conical rollers in that combination.

It is argued that the defendant's machines invade that monopoly. Those machines have not conical rollers, nor are they claimed to have any of his other mechanism. It is said that there is no invention in dividing the conical rollers into parts, and that the parts are the equivalent of the whole.

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This is not what the defendant does. The orator's machine gives the circular direction by mechanism that accomplishes that result in one way; the defendant's by different mechanism, that accomplishes it in a different way. That claim, therefore, is not infringed.

Let there be a decree dismissing the bill of complaint, with costs.

Edmund Wetmore, for the plaintiff.

Gilbert M. Plympton, for the defendant.

ARNOLD LEO

vs.

THE UNION PACIFIC RAILWAY COMPANY AND SIDNEY
DILLON. IN EQUITY.

When a stockholder in a corporation seeks to restrain it from going beyond its corporate powers, he must show that he has exercised due diligence, in the proper direction, to prevent what he seeks to restrain.

One who purchases stock knowing that the corporation is engaged in the enterprises which he seeks to stop, consents to become a member of a corporation so engaged.

A railroad corporation may have large implied powers.

A bill to restrain a corporation from exceeding its powers, should make such specific and distinct allegations, that the Court can see that there is such excess.

(Before WHEELER, J., Southern District of New York, January 24th, 1884.)

WHEELER, J. This cause has been before heard on a motion for a preliminary injunction, (17 *Fed. Rep.*, 273;) it has now been heard on demurrer to the bill. The question then was, whether the defendants should be restrained pending the

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litigation; it now is, whether there is anything in the bill which they ought to answer.

The bill is brought by a stockholder, to restrain the corporation from employing its assets in excess of its corporate powers; the other defendant is joined as president of the corporation, for discovery merely, and no bad faith is alleged or charged. The prayer is, that the corporation and its officers and agents be restrained, and for further relief. Any relief for the orator here must be wholly preventive. He could not, and does not, ask to undo what has been done. The avails of it, if held by the corporation, can only be reached through dividends common to all stockholders; if by others, only by proceedings against those who have them.

According to the bill, which is now to be taken as true, the corporation is made up of the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway and Telegraph Company. The Union Pacific Railroad Company, before the consolidation, having a definite line of road, exceeded its powers if what is now sought to be restrained is an excess, and in the same manner, by lending and advancing moneys to other railroad companies to be used in the construction, maintenance and operation of their roads, and entered into obligations to furnish further amounts, and received, in payment of moneys furnished from time to time, stocks and bonds of such roads. Since the consolidation the same course has been pursued; stocks and bonds to which the Union Pacific Railroad Company would have been entitled have been received by the defendant, and it has lent and advanced its moneys and credit to the same and other organized railroad corporations, for the purpose of, and of aiding in, the construction, maintenance and operation of their roads. There is no description of the corporations so aided, except that the corporate names of some are stated, without their source, whether from State or national authority, and some are stated to be unknown; nor of their lines of road, except as branch and connecting roads. Nor is there any statement of the amount of such aid, or of the payment therefor, except that it

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is stated as appearing from the report of the Government auditor, that the amount of stocks and bonds received from other roads was, by the Union Pacific Railroad Company, June 30th, 1878, \$5,229,327 84; June 30th, 1879, \$7,534,243 91; by the defendant, June 30th, 1880, \$15,338,453 94; and that the orator is informed and believes that the defendant now holds, of such bonds, \$23,749,230 40, and, of such stocks, \$29,462,046 98. The orator has, at different times, been a stockholder to a large amount in the defendant company. He acquired his present stock, 100 shares, November 17th, 1882, commenced to object to this course by the defendant the next day, and brought this suit December 22d, 1882. In the amended bill now under consideration, it is alleged, that, at a general meeting of the stockholders, held March 9th, 1883, at which the holders of 384,769 shares were present or represented, this course was unanimously approved of. Whether the orator was present at that meeting is not stated; neither is any effort by him with the stockholders, either separately or at any meeting, to induce them to change or desist from this course set forth, or any attempt to stop it, shown, except notifications and protests to the officers and agents of the company.

The orator could not, and does not claim to, have any right to relief on account of his former ownership of stock. Having parted with that and all rights belonging to it, he gained this as a new acquisition, and has such rights as appertain to him as the owner of it, as he acquired it.

There is no doubt, and no question is really made, but that a stockholder or partner in any enterprise has the right to prevent taking his interest into another and different enterprise, without his consent. In corporations, within the scope of the corporate authority, the majority rules; beyond this they have no right to go, and one may insist upon stopping at the limits. (*Colman v. Eastern Counties Railway Co.*, 10 *Beav.*, 1; *Salomons v. Laing*, 12 *Beav.*, 339; *Beman v. Rufford*, 6 *Eng. L. & Eq.*, 106; *Stevens v. Rutland & Burlington Railroad Co.*, 29 *Vt.*, 545.) This right to stop the majority at the bounds

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of corporate power rests upon the control which every one has over his own property. Those who become members of a corporation consent to the rule of the majority within the powers of the corporation, but not beyond. As the right to restrain going beyond depends upon the want of consent, if the consent is given the right must cease. Therefore, when such restraint is sought, due diligence, in the proper direction, to prevent what is sought to be restrained, must be shown, as as a part of the title to relief. (*Kent v. Jackson*, 14 *Beav.*, 367; *Gregory v. Patchett*, 33 *Beav.*, 595.) The exercise of the rights of a stockholder to influence corporate action by vote and speech in corporate meetings, when opportunity was presented or could be had, would lie in the proper direction. Until such means should be exhausted, or prevented, there would be no real oppression of the minority by the majority. (*Hawes v. Oakland*, 104 *U. S.*, 450.)

The transactions of which the orator complains, and the continuance of which he is seeking to prevent, have been going on in the Union Pacific Railroad Company since long before, and in the defendant company ever since, the organization of the defendant company. As he had been a stockholder before, and has derived his knowledge of what was being done from the auditor's reports open to all stockholders at least, he must have known what had been and was being done in these respects when he purchased this stock and assumed his present status in the company. He does not allege that he was in anywise ignorant of these things. His vendor is not shown to have in all this time objected, and must be taken to have acquiesced. He purchased this stock knowing that the company was engaged in the enterprises he seeks to stop, and, by taking it, he consented to become a member of a corporation so engaged. Large outlays had been made, great liabilities had been incurred, and embarrassing complications would necessarily follow stopping them in the midst. It would seem to be highly inequitable and unjust to allow such a small minority to step in and arbitrarily stop the great majority, acting in good faith, honestly, even if mistakenly and in strictness

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outside of their authority. If the company was about to undertake a new enterprise not involved with these which have been so long prosecuted, and outside of its corporate powers, such as building a new line of road, or purchasing the stock of another line so as to control it, and thereby extend its lines beyond its charter, the case might be very different.

It does not distinctly appear that the transactions in question are outside of the powers of the corporation. The Kansas Pacific Railway Company was a Kansas corporation, with powers amply sufficient, under the laws of that State, to do, within that State, all that is complained of as being done somewhere by the defendant. (*Compiled Laws of Kansas*, sec. 4,910.) This corporation was consolidated with the others as it was, and as they were; and it is not easy to see any reason why the corporate powers of each were not carried into the consolidated company. (*County of Scotland v. Thomas*, 94 U. S., 682.) Not that the consolidated company has powers in all the States and Territories where it exists, co-extensive with those of the Kansas Pacific in Kansas, but it may have in Kansas all the powers which the Kansas Pacific had there. If it has, all these transactions may be, so far as the bill shows, in that State, and within the powers authorized to be exercised there. The names of the corporations are given, but they are private corporations, although created for public purposes, and judicial notice cannot be taken of their location. Although the defendant is merely a railroad corporation, it must, from its nature and circumstances, have large implied powers, which are as well conferred as its express powers. (*National Bank v. Graham*, 100 U. S., 699.) It is burdened with vast debts, which it was fully authorized to assume, falling due in such immense sums at a time, that the ordinary revenues would be wholly inadequate to meet them. Large accumulations and investments must be made long before hand, involving great financial transactions. Operations must be had wholly foreign to the management of the railroads themselves, and pertaining much more to the business of banking than to that of a carrier. These operations, if entered into for the purpose

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of carrying on a banking business, would be wholly outside of the corporate power; but, when done for the purpose of fulfilling the financial duties of the corporation, must be clearly within them. The purchase of the stocks and bonds of other railroads might be for this legitimate purpose as well as the purchase of Government or other corporate securities. The orator has not shown that the purchases of stocks and bonds may not be of this proper class.

All these statements and allegations are in very general terms. Excess of chartered powers in progress or intended is in no particular pointed out. A decree according to the prayer of the bill would be scarcely, if any, more than a general injunction against going outside of the charters. Something more specific, and so specific that the Court can see that it is unwarranted by the law of the existence of the corporation, and wrongful to the orator as a member of it, should be pointed out distinctly. The bill, as now considered, does not appear to be sufficient to require an answer.

The demurrer is sustained, and the bill adjudged insufficient.

George Zabriskie and John E. Burrill, for the plaintiff.

John F. Dillon, for the defendants.

THOMAS M. BELL AND OTHERS

vs.

THE UNITED STATES STAMPING COMPANY. IN EQUITY.

Letters patent No. 140,619, granted to John B. Firth, July 8th, 1873, for an improvement in cake-pans, are valid, and are infringed by a structure made according to letters patent No. 255,045, granted to Joseph Smith, March 14th, 1882, for a patty-pan.

The questions of novelty and infringement considered.

(Before WHEELER, J., Southern District of New York, January 24th, 1884.)

WHEELER, J. This suit is upon letters patent No. 140,619, dated July 8th, 1873, granted to John B. Firth, for an improvement in cake-pans, and now owned by the orators. The defences are, want of novelty in the invention, want of invention in the patent, and non-infringement. The patent is for a cluster of cake-pans united to a plate having an aperture for each pan, by a double-seam joint formed from the rim of the cup turned outward and the edge of the plate about the aperture turned upward, on the upper side of the plate. The defendants make and sell similar clusters, but the double-seamed joint is formed of the rim of the pan turned outward and then inward, and of the edge of the plate turned downward on the under side of the plate, according to letters patent No. 255,045, dated March 14th, 1882, and granted to Joseph Smith, for a patty-pan. The principal things of this sort preceding Firth's patent were clusters of cups fastened to frames, pans riveted through the bottom to a plate, pans put through apertures in a plate with their rims turned out flat and riveted to the plate, pits in steam-tables and in the bottoms of wash boilers, fastened by double-seamed and soldered joints, and double-seam joints in use generally among wares of these kinds. This patented invention is not of the pans, or the plates, or the seams, but of the whole manufacture. The nearest previous approach to it in kind was the cluster with the rims riveted to the plate; and the nearest in principle was the bottom of the wash boiler. Such a bottom with two or four pits, as the evidence shows were made, would be awkward to use for, and hardly suggestive of, these small cake-pans. The rivets in the riveted cluster might be the equivalent of the double-seam joint, as a mere mode of fastening pieces of sheet metal together in some places, for some purposes; but it would not be the equivalent in this place, for this purpose. An even and smooth union was required; the riveted joint was rough and uneven; the double-seam joint there was nearly all that was desirable in these respects; and, although not a new thing, it was new in this place; and more than mere mechanical skill was requisite to the construction

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and arrangement of the necessary parts for successfully putting it there. It is no answer to the patent that all the parts were known before, if they were not known in that connection and arrangement before. (*Smith v. Goodyear, & Co., 93 U. S., 486*; *Wallace v. Noyes, 21 Blatchf. C. C. R., 83.*)

The defendant insists that, if the patent is valid, as there were double-seam joints, and cake-pans, and clusters of cake-pans fastened in a plate, before, it can only cover Firth's precise mode of uniting the cake-pans in a cluster to the plate by the double-seam joint. (*Railway Co. v. Sayles, 97 U. S., 554.*) This is, doubtless, true; and the defendant would not be liable if his mode was left to the orators, who own the patent. His mode is the use of the double-seam joint there. The defendant has not left that but has taken it. His mode of using it has been changed, and, perhaps, improved upon, and that improvement has been patented, and, perhaps, properly patented, but that gives no right to what was before patented.

Let there be a decree for the orators, for an injunction and an account, with costs.

George H. Fletcher, for the plaintiffs.

C. R. Ingersoll, for the defendant.

FRANCIS A. FOGG vs. CLINTON B. FISK.

Where, at the time a suit is removed from a State Court of New York, into this Court, by the defendant, under the Act of March 3d, 1875, (18 U. S. Stat. at Large, 470,) his examination under the Code of Civil Procedure of New York, as a witness, at the instance of the plaintiff, before trial, is pending, under an order of the State Court, the plaintiff has a right to proceed with the examination pursuant to the order.

(Before WALLACE, J., Southern District of New York, January 25th, 1884.)

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WALLACE, J. At the time this suit was removed from the State Court by the defendant, his examination as a witness was pending, under an order of that Court directing him to appear and be examined before the trial, as a witness, at the instance of the plaintiff. By the Code of Civil Procedure of this State, (§ 881,) a deposition thus taken may be read in evidence by either party at the trial of the action, and also in any other action brought between the same parties, or between parties claiming under them or either of them, and has the same effect as though the party were orally examined as a witness upon the trial. (§ 883.)

The plaintiff now moves for leave to proceed with the examination of the defendant pursuant to that order, and the defendant resists the application, upon the ground that the examination of a party, before the trial, as a witness for the adverse party, is not permitted by the practice of this Court.

It is well settled in this Circuit, that § 914 of the Revised Statutes, for conforming the practice of the Federal Courts, in suits at common law, as near as may be, to that of the State Courts, does not apply to the taking of testimony, because the statutes of Congress cover the whole subject, and these statutes not only do not provide for the examination of a party as a witness for the adverse party, before the trial, in actions at law, but do not permit evidence thus obtained to be used upon the trial, as a substitute for the oral examination of the witness. (*U. S. Rev. Stat.*, § 861; *Beardsley v. Littell*, 14 *Blatchf. C. C. R.*, 102; *United States v. Pings*, 4 *Fed. Rep.*, 714.) If, therefore, this were an action originally brought in this Court, the plaintiff should not be permitted to proceed with the examination of the defendant. But the removal Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) carefully saves to both parties the benefit of all proceedings taken in the action prior to its removal from the State Court. Section 4 declares, that, when any suit is removed from a State Court to a Circuit Court of the United States, "all injunctions, orders and other proceedings had in such suit prior to its

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removal shall remain in full force and effect until dissolved or modified by the Court to which such suit shall be removed." By force of this provision, the plaintiff is entitled to proceed with the defendant's examination, unless for some substantial reason the revisory power of this Court should be exercised to deprive him of the benefit of the order he has obtained and the proceeding he has instituted. It lies with the defendant, therefore, to present some controlling reason, to the judicial discretion, for denying to the plaintiff the right which he had secured, and of which he could not be deprived except by a removal of the suit. That both parties have deemed this proceeding an important one is obvious from the tenacity with which the right to pursue it has been contested. It appears by the record and moving papers, that the defendant has been defeated in efforts to vacate the order for his examination, by the Supreme Court at special term and at general term, and by the Court of Appeals, and that, although, for a period of eighteen months, he was willing to submit his rights to the State Courts, he invoked the jurisdiction of this Court when there was no other resource left by which he could escape an examination. Certainly, there are no equities which should induce this Court to deprive the plaintiff of the fruits of his long struggle. If the examination of the defendant could subserve no useful purpose to the plaintiff, undoubtedly, the defendant should not be subjected to it, or be put to the annoyance or inconvenience which it might entail upon him. But, although the defendant's testimony, when obtained, may not be of service to the plaintiff to the full extent it would be in the State Courts, it may, nevertheless, be of some value. If it cannot be used on the trial of this action, as a substitute for the oral examination of the defendant, it can be as the declarations of a party; and it can also be used in other suits in the Courts of this State, between the same parties or their privies, pursuant to § 881 of the Code. There seems to be no reason, therefore, for dissolving or modifying the order of the State Court, or for denying to the plaintiff the benefit of the

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proceeding which was pending when the defendant removed the suit.

The motion is granted.

John R. Dos Passos, for the plaintiff.

Wheeler H. Peckham, for the defendant.

THE VERMONT FARM MACHINE COMPANY, BENJAMIN B.
PRENTICE AND SAMUEL HILL

vs.

E. M. MARBLE, COMMISSIONER OF PATENTS. IN EQUITY.

A patent may be granted to an inventor for an invention, although it was described, but not claimed, in a prior patent granted to him by the United States, where prior public use is not shown.

(Before WHEELER, J., Vermont, January 28th, 1884.)

WHEELER, J. The orators, on the 30th of March, 1880, filed an application for a patent for improvements in milk-setting apparatus, consisting, as finally amended, of nine claims, the last five of which have been allowed; the first four have been refused because described, although not claimed, in a prior patent to the same inventors, No. 207,738, dated September 3d, 1878. Prior public use to bar the patent is denied on oath by the applicants and is not shown. The refusal rests solely, apparently, on the prior description, and *James v. Campbell*, (104 U. S., 356.) What is said in that case, taken at large, would seem to show that a patent could not be granted for an invention described in a former patent to the same inventor. What was so spoken of there had been not only de-

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scribed but patented in the former patent. What was said is to be understood by reference to what it was spoken of. That part of that case relied upon in this rejection is where it is said, (*p.* 382 :) "It is hardly necessary to remark, that the patentee could not include in a subsequent patent any invention embraced or described in a prior one granted to himself, any more than he could an invention embraced or described in a prior patent granted to a third person. Indeed, not so well; because he *might* get a patent for an invention before patented to a third person in this country, if he could show that he was the first and original inventor, and if he should have an interference declared." The latter part of this extract relates to the same subject as the former part. It expressly refers to patented inventions by others; and seems to show that patented inventions by the same inventor were intended when inventions "embraced or described" in his prior patent were referred to.

The statute does not make prior description in a patent a bar, but being "patented." (*Secs.* 4,886, 4,887, 4,920.) The Court appears to have merely referred to the plain effect of these statute provisions. In *Battin v. Taggart*, (17 *How.*, 74,) it appears to have been expressly adjudged, upon the same statute provisions as are in force now, that an inventor might have a patent for an invention described in a prior patent to himself. The same seems to have been decided in *Graham v. McCormick*, (11 *Fed. Rep.*, 859,) on full argument and much consideration. According to the terms of the statutes, the orators seem to be entitled to the patent for these claims. There does not appear to be any settled construction to control otherwise.

Let there be a decree for the applicants, adjudging that they are entitled to receive a patent for the invention covered by these first four claims of their application.

William E. Simonds and Kittredge Haskins, for the plaintiffs.

THE TIME TELEGRAPH COMPANY

vs.

JULIAN E. CAREY AND OTHERS. IN EQUITY.

H., the inventor, having assigned his patent to T., and, while in the employ of T., ordered certain machinery to be made as covered by the patent, which T. introduced to the public, left the employ of T., and procured like machinery to be made for himself, and, with the aid of C., who knew the facts, began to sell such machinery in competition with T.: *Held*, that, on a motion by T., for a preliminary injunction to restrain H. and C., they could not contest the validity of the patent or deny that it covered such machinery.

(Before WALLACE, J., Southern District of New York, January 30th, 1884.)

WALLACE, J. The peculiar facts of this case authorize the granting of a preliminary injunction as to some of the defendants, although the complainant's patent is of recent date and has never been adjudicated.

The defendant Himmer was the inventor, and assignor to the complainant, of the improvement in electric clocks described and claimed in the letters patent of the complainant. While he was in the employ of the complainant, as its superintendent, he ordered certain clock mechanism to be made, which was identical in parts and arrangement with that now sought to be enjoined, representing it to be one of the modifications of the invention secured by the patent. Special tools and dies were obtained to construct this mechanism, and the complainant's officers, assuming that the complainant was protected by the patent, have embodied this mechanism in their clocks, and introduced them to the public. After Himmer left the complainant's employ, he induced the manufacturers who were then making this clock mechanism for the complainant to supply him with the various parts sufficient to make a number of complete clocks. These have been put to

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gether by him, (or his wife, in whose name the clock making business is carried on,) and, through the agency of the defendant Carey, who seems to have been cognizant of all the facts, and to be the principal promoter of the transaction, are now being introduced to the public, in competition with the complainant's clocks.

Upon these facts, Himmer is estopped, for the purposes of a motion like this, from contesting the validity of the patent, or denying that the clock mechanism he employs is covered by the claims of the patent. He cannot be heard to assert either of these defences, after inducing the complainant to acquire the patent, and engage in making and selling clocks under it, such as he now undertakes to make and vend.

Carey occupies no better position than Himmer does. He is Himmer's *alter ego* in the scheme of pirating the complainant's rights. His general denial of community of interest with Himmer goes for nothing, in view of the facts and circumstances which are set forth in the complainant's affidavits, and which are sufficient to call upon him for a full and explicit disclosure of his relations with Himmer, in order to exonerate himself.

No case is made for an injunction against the defendants other than Himmer and Carey. As to Himmer and Carey, an injunction is granted ; as to the other defendants, the motion is denied.

Roscoe Conkling and *B. S. Clark*, for the plaintiff.

B. F. Lee, for the defendants.

JAMES S. GIBBS

vs.

ANSELM HOEFNER AND OTHERS. IN EQUITY.

A patent cannot be declared void for want of utility in the invention, if that is useful in any degree.

A license, known as a "shop right," to operate the invention at a specified place, with the right to the licensee to associate with him such party or parties as he may desire, is a personal license, not assignable, and can be availed of only in the manner expressly stipulated.

(Before COXE, J., Northern District of New York, February 1st, 1884.)

COXE, J. The complainant, who is the owner of a three-fourths interest in letters patent issued for an improvement in the manufacture of soap, seeks to recover the gains and profits which have accrued to the defendant Hoefner by reason of his alleged infringement. The other defendants are the owners of the remaining one-fourth interest, and were impleaded because they declined to join with the complainant. No personal claim is made against them. The patent expired April 25th, 1882.

Two defences are interposed upon the merits. The defendant insists, *first*, that the patent is void for want of utility; *second*, that he has not infringed.

First. Was the invention useful, within the meaning of the statute? In order to answer the question in favor of the defendant, it must be determined that it possessed no utility whatever. If it was useful in any degree, no matter how infinitesimal, the Court would not be justified in declaring the patent void. (*Lowell v. Lewis*, 1 *Mason*, 182, 186; *Earle v. Sawyer*, 4 *Mason*, 1, 6; *Seymour v. Osborne*, 11 *Wall.*, 516, 549; *Wilbur v. Beecher*, 2 *Blatchf. C. C. R.*, 132, 137; *Lehnbeuter v. Holthaus*, 105 *U. S.*, 94; *Bell v. Daniels*, 1 *Fisher*, 372, 375; *Shaw v. Colwell Lead Co.*, 20 *Blatchf. C.*

C. R., 417; *Wheeler v. Reaper Co.*, 10 *Id.*, 181, 189; *Vance v. Campbell*, 1 *Fisher*, 483, 485; *Simonds on Patents*, 92, 93; *Walker on Patents*, 52, 53.) Tested by this rule, it cannot be said that the patent was void for want of utility.

In addition to the presumption arising from the patent itself, there is evidence that the patented process worked with greater rapidity, and produced a larger quantity of soap from the same amount of material, than the methods formerly used. One of the witnesses testifies, that, by the new process, the work of three days could be accomplished in one; and the principal witness for the defence admits that the yield is slightly more than by "the open kettle process." If the Court were required to determine, on this proof, which of the two methods referred to is the better, it is not improbable that it would have to conclude that the weight of evidence is decidedly in favor of the older process. But such is not the question. If the defendant is right in his contention that the patent was valueless, and that no merchantable article could be manufactured by its use, he will have little difficulty in convincing the master that the award of damages to the complainant should be characterized by unusual frugality. To quote from *Walker on Patents*, (*supra*.) "Patents are never held to be void for want of utility, merely because the things covered by them perform their functions but poorly. In such cases, no harm results to the public from the exclusive right, because few will use the invention, and because those who do use it without permission will seldom or never be obliged to pay for that use anything beyond the small benefit they may really have realized therefrom."

Second. Did the defendant infringe? It is admitted, that, for several months, the patented machine was used in the defendant's factory, but he insists that he had the right to use it by reason of his contract with M. B. Sherwood, Jr., and Sherwood's contract with the complainant. On the 9th of June, 1873, the complainant granted to Sherwood a license, known as a "shop right," to operate the patented process at Buffalo, and at all times to associate with him such party or parties as

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he might desire. In June, 1878, Sherwood, by a written instrument, agreed to deliver to the defendant a bill of sale of all the patented machinery, etc., used in making soap, and give him the right to use it in Erie County, so far as he had the power to do so. The consideration was the sum of \$800, which the defendant agreed to pay as follows: \$100 on the execution of the instrument, \$100 in thirty days thereafter, \$200 when the profits amounted to that sum, and the remaining \$400 when half the profits reached that amount. It is unfortunate that, at this time, the defendant did not obtain a license from the complainant. He was, doubtless, misled as to his rights, and supposed he was purchasing not only the apparatus but the right to operate it. The Court, however, must construe the contract according to its true legal import. Sherwood could, of course, convey no more than he himself possessed. What he possessed was a mere "shop right" for Buffalo, a personal license to use the patented process. It was not assignable, and gave him no right to authorize others to use the process, except in the manner expressly stipulated. (*Rubber Co. v. Goodyear*, 9 Wall., 788; *Troy Factory v. Corning*, 14 How., 193; *Searls v. Bouton*, 20 Blatchf. C. C. R., 426.) After the agreement was executed, the machine and fixtures were owned by the defendant. They were operated in his place of business. Sherwood had no title to them. He was not a partner of the defendant or associated in business with him, in any legal sense. His only interest was to see that the defendant paid him the \$800, pursuant to the terms of the contract. Upon this proof, I am constrained to hold that the defendant has infringed.

The other defences, of a technical character, have been carefully examined, but it is thought that no one of them is well founded.

It follows, that there must be a decree for the complainant, with a reference to a master.

James S. Gibbs, plaintiff, in person.

Adelbert Moot, for the defendant Hoefner.

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FREDERICK VICTOR AND OTHERS vs. CHESTER A. ARTHUR.

Stockings composed of either wool or worsted and cotton, imported into the United States after the tariff Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 559,) went into effect, were not subject to duty under § 2 of that Act, as manufactures, wholly or in part, of wool or worsted, but were subject to duty under § 13 of the Act of July 14th, 1862, (12 *Id.*, 556,) as "stockings."

A specific description of an article, in a tariff Act, is not affected by a general description in a later tariff Act.

(Before COXE, J., Southern District of New York, February 4th, 1884.)

COXE, J. Prior to the Revised Statutes, the plaintiffs imported into this country stockings composed of either wool or worsted and cotton. They were made on frames, and worn by men, women and children. The collector assessed them under the 2d section of the Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 559,) which provides as follows: "On woollen cloths, woollen shawls, and *all manufactures of wool of every description, made wholly or in part of wool, not herein otherwise provided for*, fifty cents per pound, and, in addition thereto, thirty-five *per cent. ad valorem*. On flannels, blankets, hats of wool, *knit goods*, balmorals, woollen and worsted yarns, and *all manufactures of every description composed wholly or in part of worsted*, the hair of the alpaca, goat or other like animals, except such as are composed in part of wool, not otherwise provided for, valued at not exceeding forty cents per pound," etc., etc. The importers insisted that they should have been classified under section 13 of the Act of July 14th, 1862, (12 *U. S. Stat. at Large*, 556,) which is as follows: "Caps, gloves, leggins, mits, socks, *stockings*, wove shirts and drawers, and all similar articles, *made on frames, of whatever material composed, worn by men, women and children*, and not otherwise provided for."

The Supreme Court, having the provisions of the Revised Statutes under consideration, as applicable to these identical importations, say, in *Victor v. Arthur*, (104 *U. S.*, 498:) "It

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is well settled, that, when Congress has designated an article by its specific name, and imposed a duty on it by such name, general terms in a later Act, or other parts of the same Act, although sufficiently broad to comprehend such article, are not applicable to it. * * * It is conceded that stockings made on frames have been dutiable *eo nomine* since 1842, and by four different enactments."

Here, then, is a general and long recognized rule of statutory construction, applicable to the law as it existed both before and after the revision, and as applicable to the case at bar as to the case the Supreme Court were considering. Tested by it, the position of the plaintiffs seems well taken. They imported "stockings made on frames, worn by men, women and children." It would be difficult to employ language more correctly describing the articles—the duty being imposed without reference to the material.

But, it is asserted that the general language of the Act of 1867, viz., "manufactures of wool of every description," and "knit goods, * * * composed wholly or in part of worsted," repealed the provisions quoted from the Act of 1862. That it does not do this expressly is admitted, but it is argued that it operates as a repeal by implication.

The Act of 1867 was, to use the language of the defendant's brief, "intended to be a complete and exhaustive revision of the tariff, so far as it related to wool and articles containing wool." It certainly was very comprehensive, specific and minute in its classifications. That, in such an Act, where "buttons," "head nets," and "hats of wool," were not forgotten, no mention should have been made of "stockings made on frames," or the Acts which, for many years, imposed a duty upon them by that name, is, indeed, significant.

Within the rule just quoted from the Supreme Court, the specific description in the Act of 1862 was not affected by the general description in the Act of 1867. When the collector turned to the former Act, he found precisely what the law requires him to search for in the first instance—a partic-

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ular description of the imported articles. There was no need to examine farther. His duty was done.

The motion for a new trial is denied.

Stephen G. Clarke, for the plaintiffs.

Elihu Root, (*District Attorney*), and *Samuel B. Clarke*, (*Assistant District Attorney*), for the defendant.

EMIL OELBERMANN AND OTHERS vs. EDWIN A. MERRITT.

A merchant appraiser, acting in the re-appraisement of goods, who, after having taken an oath to diligently examine the goods, reports their dutiable value, cannot be allowed to testify, as a witness, that he did not so examine the goods, on the trial of a suit brought against the collector, to recover back duties paid on a valuation made as the result of such re-appraisement. Such testimony is against public policy.

(Before SHIPMAN and COXE, JJ., Southern District of New York, February 4th, 1884.)

COXE, J. On the 29th of June, 1879, the plaintiffs imported from Germany thirty-four cases of silk and cotton velvet, in two invoices, containing ten and twenty-four cases respectively. The collector designated two cases from the former and three from the latter invoice, and they were sent to the public store for examination. The appraiser advanced the entered value more than ten *per cent*. The plaintiffs, thereupon, gave notice of dissatisfaction, under section 2,930 of the Revised Statutes. The collector selected a merchant appraiser to be associated with one of the general appraisers, for the purpose of instituting a re-examination of the merchandise, as provided by law. Before entering upon his duties, the merchant appraiser took the following oath: "I, the undersigned, appointed by the collector of the district of New

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York to appraise a lot of silk and cotton velvets * * * do hereby solemnly swear, diligently and faithfully to examine and inspect said lot of silk and cotton velvets, and truly to report, to the best of my knowledge and belief, the actual market value, or wholesale price thereof, at the period of the exportation of the same to the United States, in the principal markets of the country from which the same was exported into the United States, in conformity with the provisions of the several Acts of Congress providing for and regulating the appraisement of imported merchandise. So help me God." Subsequently, he made two reports, in which, after having stated that he had examined the velvets with the general appraiser, he certified that the actual market value or wholesale price of the goods was correctly stated in the itemized schedules which followed. The aggregate of his advance over the entered value was $9\frac{1}{2}$ per cent. The general appraiser also made reports advancing the goods $17\frac{1}{10}$ per cent. There being a disagreement, the collector adopted the latter report, and levied the additional duty and penalty, as required by law.

The plaintiffs insist that the re-appraisal was invalid because the merchant appraiser did not diligently and faithfully inspect the goods. The cause was tried at the February Circuit, 1883, and resulted in a verdict for the plaintiffs. The defendant now moves for a new trial. Upon the trial, a former decision by Judge Shipman was relied upon, as supporting the proposition that an appraiser might be called to impeach his own award. Although, in that case, (*Passavant v. The Collector*,) the merchant appraiser was permitted to testify, the Court did not have before it, or attempt to decide, the question now presented for consideration. That question is: Was the merchant appraiser a competent witness to prove his own neglect of duty? Although the counsel for the defendant might have made their objections more definite, we are of the opinion that the exceptions to the admission of evidence, and to the refusal of the Court to direct a verdict, fairly entitle them to present this question here. (*Randall v. B. &*

O. R. R. Co., 109 *U. S.*, 478; *Gordon v. Butler*, 105 *U. S.*, 553.)

Stripped of all disguise, the effort, on the part of the plaintiffs, was to induce the merchant appraiser to testify that he had not done what the law required him to do. In this they were partially successful. If they had not been, no question, upon any theory, could have been presented to the jury. In other words, the only evidence of which to predicate illegality in the appraisement came from the lips of a man who took an oath that he would act legally, and subsequently certified, over his own signature, that he had done so. Should this evidence have been received?

Appraisers occupy the position of *quasi* judicial officers. They have been aptly described as "legislative referees." (*Tappan v. United States*, 2 *Mason*, 393, 406; *Harris v. Robinson*, 4 *How.*, 336.) The merchant appraiser is presumed to be, and in fact is, the special representative of the importer, and quite naturally, as was demonstrated by the evidence in this case, is somewhat biased against the Government. The examination which he is required to make may take place when he is entirely alone. Its extent is largely in his discretion. What he says of it and its sufficiency no one can contradict. The Government, if he is permitted to testify, is left remediless, and wholly at his mercy. Thus may the solemn and definitive conclusion of the tribunal to which Congress has assigned the duty of placing a value upon imported merchandise be attacked in a collateral proceeding, and swept away, upon the testimony of a negligent, forgetful or dishonest appraiser. The result, too, is infinitely more disastrous than in ordinary actions where verdicts and decisions are set aside and new trials ordered. No better illustration could be furnished than the verdict in this case. The evidence was overwhelming and hardly disputed, that the goods were undervalued. The merchant appraiser admitted this. The inference to be drawn from his testimony is, that, being compelled to advance the value, his sole anxiety was to relieve the importer from the penalty. Hence his valuation at

9½ *per cent.* advance. Notwithstanding this, the Government loses the penalty not only, but also the duty, which, upon the proof, was clearly due. Manifestly, the rules of evidence should not be relaxed to produce a result so inequitable. To permit the awards of this important legislative tribunal to be overthrown upon the assertion of one of its members, made years afterwards, is, we think, clearly against public policy. To hold otherwise, would be, in effect, to allow the witness to deny his oath, and stultify himself, by an impeachment of his own finding—to contradict a record by speculative and fallible testimony. In short, it would set a premium upon incompetency, inaccuracy and fraud. We do not intend to intimate that the evidence in the case at bar establishes more than forgetfulness, or, perhaps, carelessness, on the part of the merchant appraiser. The mischief is in establishing a rule under which ample opportunity is given for a complete reversal of the aphorism—"Corruption wins not more than honesty."

We have been referred to no case, and are quite confident none can be found, where this precise question has been decided. The weight of authority upon analogous questions, however, having reference to jurors, referees, arbitrators and commissioners, sustains the position here taken. Every objection to them applies with equal or greater force to an appraiser.

What are the arguments against the admissibility of this testimony? It permits, it is said, a solemn record to be attacked by parol evidence, and that, too, in a collateral proceeding. It permits a witness whose memory is clouded and confused by a thousand intervening events to dispute the rectitude of a finding made when all was fresh and clear before him. It promotes litigation. It encourages bribery, trickery and fraud. These are some of the reasons; and which one of them does not apply to an appraiser? If a judicial officer or a juror may not testify to misbehavior on his part; if appraisers of canal damages, or commissioners under State law, cannot be heard to say that they did not sufficiently

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view or examine the land alleged to be damaged; if an arbitrator cannot impeach his own award; we fail to find any reason, founded upon authority, why the evidence here should stand.

As the conclusion reached upon this branch of the case necessitates a new trial, it will not be necessary to consider the other propositions argued. It may be said, however, with great plausibility, in view of all the testimony in the case, and particularly that of the Government appraiser, refreshed as it was by stenographic notes taken at the time, showing the nature of the examination and the part taken by the merchant appraiser, that the verdict should be set aside as against the weight of evidence, it being established, by a great preponderance of testimony, that every requirement of law was carefully obeyed.

A new trial is ordered.

SHIPMAN, J., concurs.

D. H. Chamberlain and *Eugene H. Lewis*, for the plaintiffs.

Elihu Root, (*District Attorney*), and *Samuel B. Clarke*, (*Assistant District Attorney*), for the defendant.

FRANCIS MUNSON

vs.

THE MAYOR, &C., OF NEW YORK. IN EQUITY.

In a suit against a municipal corporation, founded on a patent for a register for preserving paid bonds and coupons, it was enjoined from using the patent. In the final decree, nominal profits and damages, and a small balance of costs, were adjudged to the plaintiff. A motion by the defendant to sus-

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pend the injunction during the pendency of an appeal from the final decree was denied.

(Before WHEELER, J., Southern District of New York, February 4th, 1884.)

WHEELER, J. This cause has now been heard on a motion to suspend the injunction heretofore granted, (18 *Blatchf. C. C. R.*, 237,) during the pendency of an appeal from the final decree awarding to the orator a merely nominal sum for profits and damages and a small balance of costs of the suit. After a decree on final hearing establishing an exclusive right, and awarding an injunction to protect the right, the injunction is not suspended unless some extraordinary cause is shown to exist outside the rights of the parties established by the decree. (*Potter v. Mack*, 3 *Fisher's Pat. Cas.*, 428; *Brown v. Deere*, 6 *Fed. Rep.*, 487.) This patent is for a register for preserving, for safety and convenience of reference, paid bonds and coupons. The defendant used the patented register for this purpose as any corporation, partnership, or individual issuing and redeeming coupon bonds would. The use by the defendant is not public any more than such use would be, nor any more than any business transaction of the city is. The city is a public municipal corporation, and a large part of the public have a pecuniary interest in its financial transactions of all kinds; and this is all the interest of the public in this question. It does not affect the convenience, enjoyment, or business of the individuals composing the public, at all. It touches only the convenience of the officers whose duty it is to preserve safely, and refer to when necessary, the bonds and coupons. On the accounting, it was insisted, on behalf of the defendant, that this convenience was of no value or benefit, and with such success that a decree has been entered to that effect. It does not now seem to be equitable and just, in view of that result, to allow that a deprivation of that convenience is too grievous to be borne. The orator, as the case now stands, is entitled to the exclusive use of his patented invention. If the injunction should be suspended during the appeal, and the decree be affirmed, the orator would be left to another

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accounting, either in a new suit, or under some order in this one, which, if it should follow the former result, would be much worse than fruitless. The appeal really involves nothing, so far, but the costs of suit. There seems to be no reason why the orator's right to his monopoly should not be protected in the usual modes; in fact it does not appear that they can be fully protected but by this injunction. The motion cannot, therefore, justly be sustained.

Motion denied.

Royal S. Crane, for the plaintiff.

Frederic H. Betts, for the defendant.

J. MCGREGOR ADAMS

vs.

JOHN W. HOWARD AND DAVID R. MORSE. IN EQUITY.

Where a patent expires during the pendency of a suit in equity brought for its infringement, an accounting will be ordered, if the plaintiff establishes his cause of action, although no injunction can be granted.

In a suit in equity for the infringement of two patents, the plaintiff had a decree on only one, having failed to establish infringement of the other. The Court did not award costs to either party.

(Before WALLACE, J., Southern District of New York, February 6th, 1884.)

THIS suit was founded on two patents. Infringement of only one of them was established. It expired during the pendency of the suit.

Frederic H. Betts, for the plaintiff.

James A. Whitney, for the defendants.

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WALLACE, J. No doubt is entertained of the propriety of decreeing an accounting, although the patent has expired since the commencement of the suit, and although for that reason there should not be an injunction. The jurisdiction of a Court of equity having been legitimately invoked by the complainant, he will not be sent away without redress, merely because all the redress to which he was originally entitled cannot now be awarded to him. Under such circumstances, the Court will retain the cause in order to completely determine the controversy, (*Gottfried v. Moerlein*, 14 *Fed. Rep.*, 170.)

Inasmuch as the complainant has united two distinct causes of action in his bill, and, upon his allegation that the defendants' lanterns infringed both of the letters patent, has compelled the defendants to litigate both, and as to one of these causes of action the defendants have prevailed, neither party should recover costs as against the other. (*Strickland v. Strickland*, 3 *Beav.*, 242; *Crippen v. Heermance*, 9 *Paige*, 211; *Elfelt v. Steinhart*, 6 *Sawyer*, 480.)

A decree is ordered for the complainant, in conformity with this opinion.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY

vs.

ROBERT K. DOW AND OTHERS. IN EQUITY.

On the foreclosure of a mortgage on the property and franchises of a railroad corporation created by Arkansas, the trustees under the mortgage purchased the property, on the sale, for the benefit of the bondholders. A new corporation was organized, its stock was issued to such bondholders, for unpaid interest on their bonds, and they received for their old bonds new bonds issued under a new mortgage on the property. The stock passed into new hands, and its holders, acquiring control of the corporation, brought this suit

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in its name to set aside the new mortgage, as *ultra vires* and in violation of the Constitution of Arkansas: *Held*,

- (1.) The new mortgage was given for property actually received, and the new bonds were the consideration of the conveyance of the property to the new corporation;
- (2.) The vendors were the old bondholders, and the vendee was the new corporation;
- (3.) The latter, on purchasing the property, could mortgage it to secure the purchase money;
- (4.) The corporation could not be allowed to retain the property and not pay the purchase price;
- (5.) The bondholders would be entitled to protection, as having a vendor's lien.

(Before WALLACE, J., Southern District of New York, February 11th, 1884.)

WALLACE, J. The complainant's bill is filed against the trustees and holders of the mortgage bonds of the complainant for \$2,600,000, and the mortgage upon its corporate franchises and property for securing the same, executed May 2d, 1877, seeking to annul the bonds and mortgage, upon the ground that they were issued and executed by the complainant without corporate power in that behalf.

A brief statement of the facts relating to the creation of the mortgage bonds, their origin, consideration and purpose, will serve to present the legal questions involved. The complainant, created under a special Act of the legislature of Arkansas, is a re-organized corporation, which has succeeded to the property and franchises of a former corporation of the same name, under the foreclosure of a mortgage of that corporation and a conveyance under the decree of foreclosure. By the terms of that mortgage, and by the provisions of the decree of foreclosure in conformity therewith, it was provided, that, if the trustees named in the mortgage should be requested so to do by a majority of the holders of the bonds secured thereby, they might purchase the property, and in that case no bondholder should have any claim to the premises or the proceeds thereof except for his *pro rata* share, as represented in a new corporation or company, to be formed by a majority in interest of said bondholders, for the use and benefit of the holders

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of the mortgage bonds. The trustees purchased at the sale, and thereupon the bondholders proceeded to organize the present corporation. There was due to the holders of the old mortgage bonds \$2,600,000 of principal, and \$1,300,000 of unpaid interest, and the scheme of re-organization contemplated the acceptance by the bondholders of the new mortgage bonds in place of their old ones, and of the capital stock in place of their accrued and unpaid interest. Accordingly, by the terms of the re-organization agreement, the capital stock of the new corporation was fixed at \$1,300,000, divided into 13,000 shares of \$100 each, and was declared to be full paid; and, by the same agreement, the trustees who had purchased at the foreclosure sale were directed to transfer the property and franchises purchased by them to the new corporation, upon the condition, among others, that the corporation should execute and deliver to said trustees the new mortgage bonds for \$2,600,000, now sought to be set aside. Thereupon, the new corporation having agreed to accept a conveyance of the property and franchises of the old corporation, pursuant to the terms of the re-organization agreement, the trustees conveyed the same to the new corporation, the deed of conveyance reciting the conditions upon which, as trustees for the owners of the outstanding mortgage bonds, they were authorized to make such conveyance, and further reciting the acceptance of such conditions by the new corporation. The corporation accepted this conveyance and took possession under it. Every certificate of shares of stock issued by it contains a recital, that the holder takes his stock subject to the mortgage bonds in question. The new mortgage bonds were issued and delivered to the trustees, for the holders of the outstanding mortgage bonds, and were distributed by the trustees, *pro rata*, to the holders of those bonds. The capital stock was also apportioned among the holders of these bonds, *pro rata*, and certificates were delivered for the shares to which each bondholder was entitled.

After the re-organized corporation had operated the railroad for several years, and early in the year 1880, the majority of the stock was acquired by Messrs. Marquand, Gould and

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Sage, in the interest of the St. Louis, Iron Mountain and Southern Railway Company. The object seems to have been to acquire control of the corporation, and subordinate its management to the interests of the Iron Mountain Company. The parties who thus acquired control now control the corporation, and, speaking through it, insist that the mortgage bonds which were the consideration of the transfer of the property to the corporation are void, and should be set aside. The case, then, is this: The complainant is a corporation which was brought into life by a body of creditors of a pre-existing corporation, who had succeeded to all the property thereof, and who proposed to convey such property to the complainant, upon receiving, among other considerations, the mortgage bonds in suit. The complainant assented to this proposition, accepted a conveyance of the property, and executed its mortgage bonds. It asserts now, that, although it had power to acquire the property, it had no lawful power to pay for it in the terms and manner promised. Its contention is founded upon a section of the charter or Act of incorporation, by which alone it is claimed its power to create a mortgage is conferred; and upon a provision of the Constitution of Arkansas, which limits the power of corporations of that State, in issuing bonds.

The section of the charter relied on is § 9, which is as follows: "The said company may at any time increase its capital to a sum sufficient to complete the said road and stock it with everything necessary to give it full operation and effect, either by opening books for new stock, or by selling such new stock, or by borrowing money on the credit of the company, and on the mortgage of its charter and works." The constitutional provision is contained in article XII, and declares: "No private corporation shall issue stock or bonds except for money or property actually received, or labor done; and all fictitious increase of stock or indebtedness shall be void."

As the bonds and stock issued by this corporation were issued for property actually received, viz., the railroad and all the corporate property, it is not obvious how this constitu-

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tional provision has any application to the present controversy. It is assumed, in the argument of counsel for the complainant, and reiterated several times, that the complainant received no consideration for the mortgage bonds. Upon what theory this is claimed or can be maintained is not apparent, and, indeed, is incomprehensible. The original corporation had been divested of its property by the foreclosure sale. The newly organized corporation accepted a reconveyance upon the condition of executing the new mortgage bonds to the vendors. Whether the complainant is a new corporation, or whether it is the old corporation, need not be considered, because, in either view, the mortgage bonds were the consideration of the conveyance.

The proposition which is advanced, that the vendors and the vendees were the same persons, and, therefore, there could be no contract or sale, is not even technically correct. One of the parties was the corporation; the bondholders, by their trustees, were the other parties. True, the stockholders of the corporation were also the bondholders, but the circumstance that all the stockholders of a corporation are at the same time the several owners of the property which the corporation wishes to buy does not destroy the power of the parties to contract together. Suppose there were two corporations, each composed of the same stockholders, can it be seriously contended that one corporation could not make a contract with the other? A corporation may contract with its directors, why not with its stockholders? If the complainant ever acquired the property, it was by a purchase; if it could purchase, the bondholders could sell, and the mortgage was the consideration of the purchase and sale.

The primary questions, then, are, first, whether, upon the purchase of property, the corporation could mortgage what it acquired, to secure the purchase money; and, second, whether section 9 of the charter has any application to such a transaction. It is to be observed, that the complainant does not question its own power to acquire the property conveyed to it. It cannot do this while it holds on to the property and

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seeks to remove the lien of the mortgage. It it could legitimately purchase, why could it not, like an individual purchaser, mortgage to secure the price? A corporation, in order to attain its legitimate objects, may deal precisely as can an individual who seeks to accomplish the same ends, unless it is prohibited by law to incur obligations as a borrower of money. "Corporations having the power to borrow money may mortgage their property as security. Although it was at one time a question whether express legislative consent was not required in order to authorize a mortgage of any corporate property, as, for example, in *Steiner's Appeal*, (27 Penn. St., 313,) yet the rule now is, that a general right to borrow money implies the power to mortgage all corporate property except franchises, unless restrained by express prohibition in the Act of incorporation, or by some general statute." (*Green's Brice's Ultra Vires*, 123.) In the late case of *The Philadelphia & Reading R. R. Co. v. Stickler*, (21 Am. Law Reg., N. S., 713,) the Supreme Court of Pennsylvania considered the question, and, Paxson, J., delivering the opinion of the Court, said: "So far as the mere borrowing of money is concerned, it is not necessary to look into the charter of the company for a grant of express powers. It exists by necessary implication. * * * The reason is plain; such corporations are organized for the purposes of trade and business, and the borrowing of money and issuing obligations therefor are not only germane to the objects of their organization, but necessary to carry such objects into effect." In *Platt v. Union Pacific Railway Co.*, (99 U. S., 48, 58,) Mr. Justice Strong, speaking for the Court, says: "Railroad corporations are not usually empowered to hold lands other than those needed for roadway and stations or water privileges. But when they are authorized to acquire and hold lands separate from their roads, the authority must include the ordinary incidents of ownership—the right to sell or to mortgage." The right of mortgaging follows as a necessary incident to the right of managing the business of a corporation according to the usual methods of business men. The right of a corporation to mortgage its

franchises, or the property which is essential to enable it to perform its functions, is generally denied by the authorities. But does the reason upon which this denial rests have any application to a case like the present? The foundation of the doctrine is, that such a mortgage tends to defeat the purposes for which the corporation was chartered, and the implied undertaking of those who obtain the charter, to construct and maintain the public work, and exercise the franchises for the public benefit. Some judicial opinion is found to the effect that there is no good reason for denying the right to make such a mortgage without legislative consent, because the transfer of the franchise to new hands, through a foreclosure, is, in fact, a change no greater than may take place within the original corporation, and the public interests are as safe in such new hands as they were in those of the original corporators. (*Shepley v. Atlantic & St. Lawrence R. R. Co.*, 55 *Maine*, 395, 407; *Kennebec & Portland R. R. Co. v. Portland & Kennebec R. R. Co.*, 59 *Maine*, 9, 23; *Miller v. Rutland & Washington R. R. Co.*, 36 *Vt.*, 452, 492.)

Here, the mortgage was executed to enable the corporation to resume the exercise of its charter powers and fulfil the purposes for which it was originally created. No precedent has been found denying to a corporation the power to execute a mortgage of everything it acquires by a purchase, when the mortgage is a condition of making the purchase; and there seems to be no reason, in a case like the present, for denying the power, when the purchase of the mortgagor includes the franchise and the whole property of the corporation.

Section 9 of the charter is not a restriction upon the implied power of the corporation to incur such obligations as are necessary to enable it to carry on its business. It is a provision which would seem to be intended to enlarge rather than to restrict the power of the corporation in this regard. Its purpose is to authorize an increase of capital to an extent commensurate with the necessities of the corporation, in any of the modes usually adopted by corporations for raising money—a provis-

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ion which was necessary in view of section 4 of the charter, which limits the amount of increase. As a corporation has no implied authority to alter the amount of its capital stock, where the charter has definitely prescribed the limit, this permission was necessary. The purchase of property by the corporation for cash or on credit is not an increase of its capital.

There is another ground, however, upon which the decision of the case may rest more satisfactorily. Assuming that the complainant transcended its charter powers in creating the mortgage bonds in question, it cannot be permitted to retain the benefits of its purchase, and at the same time repudiate its liability for the purchase price. The rule is thus stated by a recent commentator: "The law, founded on public policy, requires that a contract made by a corporation in excess of its charter powers be voidable by either party, while a rescission can be effected without injustice. But, after a contract of this character has been performed by either of the parties, the requirements of public policy can best be satisfied by compelling the other party to make compensation for a failure to perform on his side." (*Morawetz on Corporations*, § 100.)

It is to be observed, that, in the present case, there is no express statutory or charter prohibition upon the corporation to purchase the property or mortgage it for the purchase money. At most, its acts were *ultra vires* because outside the restricted permission of the charter. It is not necessary, therefore, to consider the distinction, made by some of the adjudications, between the two classes of cases. (*Hitchcock v. Galveston*, 96 U. S., 341.) The decided weight of modern authority favors the conclusion, that neither party to a transaction *ultra vires* will be permitted to allege its invalidity while retaining its fruits. The question has frequently been considered in cases where a corporation suing to recover upon a contract which has been performed on its side is met with the defence that the contract was *ultra vires*, or prohibited by the organic law of the corporation. (*Whitney Arms Co. v. Barlow*, 63 N. Y., 62; *Oil Creek & Allegheny R. R. Co. v.*

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Penn. Transportation Co., 83 *Pa. St.*, 160; *Bly v. Second National Bank*, 79 *Pa. St.*, 453; *Gold Mining Co. v. National Bank*, 96 *U. S.*, 640; *National Bank v. Matthews*, 98 *U. S.*, 621.) The latter case is a forcible illustration of the rule generally adopted. There, a national banking association was proceeding to enforce a deed of trust given to secure a loan on real estate made by the association, in contravention of section 5,136 of the Revised Statutes of the United States, prohibiting, by implication, such an association from loaning on real estate; and the maker of the trust deed sought to enjoin the proceeding upon that ground. The Court, speaking through Mr. Justice Swayne, cites with approval *Sedgwick on Statutory and Constitutional Construction*, (p. 73,) in which the author states, that the party who has had the benefit of the agreement will not be permitted to question its validity, when the question is one of power conferred by a charter. Another class of cases is where the corporation itself attempts to set up its own want of power, in order to defeat an agreement or transaction which is an executed one as to the other party, and from which the corporation has derived all that it was entitled to. Such cases were *Parish v. Wheeler*, (22 *N. Y.*, 494;) *Bissell v. M. S. & N. I. R. R. Cos.*, (*Id.* 258;) *Hays v. Galion Gas Co.*, (29 *Ohio St.*, 330, 340;) *Attleborough Bank v. Rogers*, (125 *Mass.*, 339;) *McCluer v. Manchester R. R. Co.*, (13 *Gray*, 124;) *Bradley v. Ballard*, (55 *Ill.*, 418;) *Rutland R. R. Co. v. Proctor*, (29 *Vt.*, 93.) In *Whitney Arms Co. v. Barlow*, (63 *N. Y.*, 62, 70,) the Court says: "It is now very well settled, that a corporation cannot avail itself of the defence of *ultra vires*, where the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. If an action cannot be brought directly upon the agreement, either equity will grant relief, or an action in some form will prevail."

The present case is phenomenal in the audacity of the attempt to induce a Court of equity to assist a corporation in repudiating its obligations to its creditors, without offering

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to return the property it acquired by its unauthorized contract with them. The fundamental maxim is, that he who seeks equity must do equity. Every stockholder of the corporation, when he acquired his stock, took it with notice, explicitly embodied in his certificate, that his interest as a stockholder was subordinate to the rights of the holders of the mortgage bonds. It is now contended, that, if there is any obligation on the part of the corporation to pay for the property it purchased, it is not to pay what it agreed to, but to pay a less consideration, because the property was not worth the price agreed to be paid. The Court will not compel the bondholders to enter upon any such inquiry. They were entitled to set their own value on their own property. When the complainant offers to reconvey the property in consideration of which it created its mortgage bonds, it will have taken the first step towards reaching a position which may entitle it to be heard.

It may be said, in conclusion, that there would be no difficulty, on well recognized principles, in protecting the bondholders against the destruction of their claims, upon the theory of a vendor's lien for the purchase money. The taking of a mortgage by their trustees, so far from evidencing an intention to waive the lien, is conclusive evidence to the contrary.

The bill is dismissed, with costs.

Wager Swayne, for the plaintiff.

John M. Bowers, for the defendants.

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The Bank of the Metropolis v. The First National Bank of Jersey City.

THE BANK OF THE METROPOLIS

vs.

THE FIRST NATIONAL BANK OF JERSEY CITY.

A check owned by one bank, and sent by it to another bank, with the endorsement, "For collection, pay to the order of B., cashier," he being the cashier of the second bank, was sent by the second bank, for collection, to a third bank, under an arrangement by which the money, which was collected, went into a general account between it and the second bank. After the third bank received the check, the second bank failed, being largely indebted to the third bank. The first bank sued the third bank to recover the proceeds of the check: *Held*, that the restricted endorsement was notice to the third bank that the second bank held the check only as an agent, for collection, and did not own it, and that the plaintiff was entitled to recover.

(Before WALLACE, J., Southern District of New York, February 11th, 1884.)

WALLACE, J. The plaintiff sues to recover the amount of certain checks of which it was the holder and owner, and which came to the defendant's hands, and were collected by its sub-agent, under the following circumstances: The plaintiff sent the checks to the Mechanics' National Bank of Newark, for collection, with the qualified endorsement, "For collection, pay to the order of O. L. Baldwin, cashier," Baldwin being the cashier of that bank. The Mechanics' National Bank of Newark sent the checks for collection to the defendant, pursuant to an existing arrangement between them, by which each sent to the other commercial paper for collection, it being understood that the proceeds were not to be specifically returned, but were to be credited to the sending bank by the receiving bank, and enter into the general account between them, consisting of such collections and other items of account, and offset any indebtedness of the sending bank to the receiving bank. After the defendant received the checks in question, the Mechanics' National Bank of Newark became insolvent, and suspended payment, being indebted to the de-

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fendant, under the state of the accounts between them, in a considerable sum.

Upon these facts it is clear, that the relations between the defendant and the Newark bank, in respect to paper received by the former from the latter for collection, were those of debtor and creditor, and not merely of agent and principal, (*Morse on Banks*, 52,) and the defendant, having received the paper with the right to appropriate its proceeds upon general account, as a credit to offset or apply upon any indebtedness existing or to accrue from the Newark bank, growing out of the transactions between the two banks, was a holder for value. Since the decision in *Swift v. Tyson*, (16 *Peters*, 1,) it has been the recognized doctrine of the Federal Courts, that one who acquires negotiable paper in payment or as security for a pre-existing indebtedness, is a holder for value. (*National Bank of the Republic v. Brooklyn City R. R. Co.*, 14 *Blatchf. C. C. R.*, 242; *affirmed*, 102 *U. S.*, 14.) And, if the defendant had been justified in assuming that such paper was the property of the Newark bank, it would have been entitled to a lien upon it for a balance of account, no matter who was the real owner of the paper. (*Bank of Metropolis v. New England Bank*, 1 *How.*, 234.) But, the checks bore the endorsement of the plaintiff in a restricted form, signifying that the plaintiff had never parted with its title to them. In the terse statement of Gibson, Ch. J.: "A negotiable bill or note is a courier without luggage. * * * A memorandum to control it, though endorsed on it, would be incorporated with it and destroy it." (*Overton v. Tyler*, 3 *Penn. St.*, 347.) The endorsement by the plaintiff, "for collection," was notice to all parties subsequently dealing with the checks, that the plaintiff did not intend to transfer the title of the paper, or the ownership of the proceeds, to another. As was held in *Cecil Bank v. Farmers' Bank of Maryland*, (22 *Maryland*, 148,) the legal import and effect of such endorsement was to notify the defendant that the plaintiff was the owner of the checks, and that the Newark bank was merely its agent for collection. In *First National Bank v. Reno County Bank*,

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(3 *Fed. Rep.*, 257,) paper was endorsed, "pay to the order of Hetherington & Co., Atchison, account of First National Bank, Chicago;" and it was held to be such a restrictive endorsement as to charge subsequent holders with notice that the endorser had not transferred title to the paper or its proceeds. Under either form of endorsement, the natural and reasonable implication, to all persons dealing with the paper, would seem to be, that the owner has authorized the endorsee to collect it for the owner, and conferred upon him a qualified title for this purpose, and for no other. Other authorities in support of this conclusion are *Sweeny v. Easter*, (1 *Wall.*, 166;) *White v. National Bank*, (102 *U. S.*, 658;) *Lee v. Chillicothe Bank*, (1 *Bond*, 389;) *Blaine v. Bourne*, (11 *R. I.*, 119;) *Claffin v. Wilson*, (51 *Iowa*, 15.) The defendant could not acquire any better title to the checks or their proceeds than belonged to the Newark bank, except by a purchase for value, and without notice of any infirmity in the title of the latter. As the endorsement of the checks was notice of the limited title of the Newark bank, the defendant simply succeeded to the rights of that bank.

It is insisted, for the defendant, that there was no privity between the plaintiff and the defendant, respecting the transaction, because the defendant was not employed by the plaintiff, but was the agent only of the Newark bank; and it is argued, that, if the defendant is answerable to the plaintiff, so would be every other party through whose hands the paper might pass, in the process of being collected. In answer to this, it is sufficient to say, that the defendant is sued, not as an agent of the plaintiff, nor upon any contract liability, but upon the promise which is implied by law, whenever a defendant has in his hands money of the plaintiff which he is not entitled to retain as against the plaintiff. It has long been well settled, that want of privity is no objection to the action of *indebitatus assumpsit*, for money had and received. (See note A, Appendix, 1 *Cranch*, 367, where the authorities are collated.) As against the plaintiff, the defendant had no right to retain the proceeds of the checks as security or pay-

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ment for any balance due to it from the Mechanics' National Bank of Newark, after a demand by the plaintiff.

The plaintiff is, therefore, entitled to judgment.

John Delahunty, for the plaintiff.

Hamilton Wallis, for the defendant.

ELIZABETH H. W. BRAINARD

vs.

THE EVENING POST ASSOCIATION. IN EQUITY.

Letters patent No. 149,092, granted to Charles Rollin Brainard, March 31st, 1874, for an improvement in compositors' copy distributors, are invalid, for want of patentability of what is claimed, namely, "The copy distributor described, consisting of the galley-holder N, provided with compartments for galleys, and pins or hooks for copy, correspondingly lettered, substantially as and for the purpose specified."

Before the invention of Brainard, a series of hooks for copy was lettered to correspond with the letters systematically placed upon the copy and marked upon the type when placed in the galley, and there was no invention in permanently lettering the galley to correspond with the lettering on the hooks.

(Before SHIPMAN, J., Connecticut, February 14th, 1884.)

SHIPMAN, J. This is a bill in equity for relief against the alleged infringement of letters patent to Charles Rollin Brainard, No. 149,092, dated March 31st, 1874, for an improvement in compositors' copy distributors. The plaintiff is the owner of the patent.

The invention is described in the specification as follows: "My invention * * * consists in a galley-holder provided with a series of compartments and pins or hooks, correspondingly lettered or numbered, as hereinafter more fully set forth,

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the object being to keep the copy properly assorted, thus greatly facilitating and reducing the expense of proof-reading. * * * It is well known to all practical printers and proof-readers, that, as the compositors empty their matter into the different galleys on the stand, the copy is usually deposited into a common receptacle, without regard to the nature of the article or the order of setting. From this receptacle the proof-reader is obliged to hunt up or select the copy corresponding with his proof, frequently causing much confusion and delay, when time is very important, especially when the 'takes' are small. In the drawing, N is an ordinary galley-stand or holder, provided with compartments or slips, lettered in regular order, from A to M. Disposed in the upper part of the stand are a series of pins or hooks or copy-holders, lettered to correspond with the compartments. * * * * When the compositor goes to the 'bank' or 'dump' to empty matter, instead of depositing his copy in a drawer, it is impaled on the pin or hook in the stand corresponding with the slip in which the galley is located." The claim is for "the copy distributor described, consisting of the galley-holder N, provided with compartments for galleys, and pins or hooks for copy, correspondingly lettered, substantially as and for the purpose specified."

The important question in the case is that of patentability. To determine this question, a knowledge of the exact relation which the invention bore to the previous state of the art is necessary. The case of *Brainard v. Pulsifer*, (7 *Fed. Rep.*, 349,) was tried before Judge Lowell, upon the patent, and a "short stipulation as to the state of the art and the thing which the defendants use." So much of the stipulation as related to the history of the art is as follows: "It is further stipulated and agreed, that, prior to the grant of the complainant's patent, it was customary to conduct the business of sorting copy, in daily newspaper printing offices, substantially as follows: The copy was cut into suitable lengths, called, technically, 'takes,' and distributed in order to the compositors in the office. When a compositor had set up his 'take,' he de-

posited the type set up by him on a galley upon the galley-bank, and deposited the copy from which he had set up the type in a drawer, or box, or upon a table or shelf, or other receptacle, for the proof-reader." When proofs were submitted to the proof-reader for correction, he was also furnished with the "copy," procured from the receptacle on or in which it had been placed. Upon this state of facts, Judge Lowell sustained the patent, and it seems to me that there was no reason for a different conclusion.

But, it is now clearly shown, that the "New York Sun" office, in 1868, and thereafter, and before the date of the patented invention, used the following system: There was placed over the dumping galley a series of lettered hooks, which were lettered to correspond with the letters which, by the custom of the office, were uniformly placed upon the different classes of matter to be put in type. The "takes," or small pieces of copy, were marked with their appropriate letter, and were numbered in numerical order, and were given to the compositors, each of whom placed his matter, when in type, upon a galley in the galley-bank, and marked it with a tag to correspond with the letter and number on his copy, and placed his copy on the hook which contained the appropriate letter. Sometimes, instead of the tags, the galleys were chalked with a letter, to indicate where the copy containing the letter was placed.

In the "Waterbury American" office, for the greater part of the time between 1868 and 1872, there was a system of lettered hooks and spindles over the galley-bank, the letters or words indicating the character of the copy to be placed on each hook. Copy was placed upon the respective hooks, was taken therefrom by the compositors, and, when set in type, was returned to the spindles, and the type was placed upon the galleys, which, though not designated, were "understood, as a rule of the office, to correspond respectively with the copy-hooks and holders."

It thus appears, especially by the testimony from the Sun office, that separate hooks for the reception of copy, corre-

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spondingly lettered with the letters placed upon the copy and designated upon the type when placed in the galley, were used, and thus the delay from having to search through a large pile of copy for the needed slip was avoided.

The improvement of the patentee consisted in having lettered hooks to correspond with lettered galleys. When the art had arrived at lettering a series of hooks to correspond with the letters systematically placed upon the copy and marked upon the type when placed in the galley, there does not seem to me to have been any invention in permanently lettering the galley to correspond with the lettering upon the hooks. The only advance upon the simple system of the comparatively small Waterbury American office was the enlargement of the system, so as to adapt it to the needs of a much larger newspaper, by the use of a greater number of lettered hooks, and the lettering of the galleys instead of their being designated by rule of the office and in the memory of the compositor.

The description of the invention which was given by the patentee upon his cross-examination is as follows: "When the compositor has emptied his type on the galley, he is instructed, by my invention 149,092, to deposit his copy on a receptacle corresponding to the galley where his matter is, or corresponding to the 'take mark' on his copy, and thereby keep the copy for that galley or article distinct and separate from all other copy or matter, for the more immediate convenience of the proof-reader, and without the labor usually entailed on a copy-sorter." The invention thus described was substantially used in the Sun office, and the patented improvement was a convenient modification of, but not a substantial advance upon, the Sun's system.

Believing that the invention was not patentable, I have not examined the question of infringement.

The bill is dismissed.

Charles Rollin Brainard, for the plaintiff.

William Edgar Simonds, for the defendant.

LEONIDAS DOTY AND HENRY L. RANKIN, AS SURVIVING ASSIGNEES IN BANKRUPTCY OF THE PHOENIX MILLS, PLAINTIFFS IN ERROR

vs.

ALBERT J. JEWETT, AS SURVIVING PARTNER OF JEWETT & JOHNSON, AND ANGELINE C. JOHNSON, AS ADMINISTRATRIX, AND STEPHEN B. JOHNSON, AS ADMINISTRATOR, &C., OF WILLIAM JOHNSON, DECEASED, DEFENDANTS IN ERROR.

Where an action at law, brought in the District Court, is tried there, by the Court, on an issue of fact, without a jury, on due waiver of a jury, and a writ of error is sued out to review in the Circuit Court the judgment entered on the decision of the District Court, no question arising on a bill of exceptions can be considered by the Circuit Court, on such writ of error.

The question is one of the power of the Circuit Court, and is not such a question of practice as is embraced in § 914 of the Revised Statutes.

Issues of fact, in an action at law, in a District Court, must, under § 566 of the Revised Statutes, be tried by a jury, and there is no statutory provision for the waiver of a trial by jury, and no special statutory power conferred on the Circuit Court to consider any questions raised by a bill of exceptions, in such an action not tried by a jury.

The plaintiffs having throughout treated the suit as an action at law, and brought a writ of error and not an appeal, it must be so treated by the Circuit Court.

The agreement of parties cannot authorize the Circuit Court to revise a judgment of the District Court in any other mode of proceeding than that which the law prescribes.

As the District Court had jurisdiction of the subject-matter and the parties, and there was no error in the record, and nothing found in the bill of exceptions could be considered, the Circuit Court affirmed the judgment, with costs.

(Before BLATCHFORD, J., Northern District of New York, February 16th, 1884.)

BLATCHFORD, J. This is an action brought in the District Court of the United States for the Northern District of New York, by the plaintiffs in error against the defendants in error. The first pleading of the plaintiffs calls itself a complaint and

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is sworn to as a complaint. It sets forth the co-partnership of Albert Jewett and William Johnson, as Jewett & Johnson; an indebtedness of the firm to the Phoenix Mills, a corporation, of \$6,208 51, for goods sold and moneys advanced; the adjudication of the corporation as a bankrupt; the appointment of the plaintiffs and said Johnson as its assignees; an assignment to them; the death of Johnson; the insolvency of Jewett; the want of co-partnership assets of Jewett & Johnson to pay any part of said debt; the absence of any other remedy for the plaintiffs to collect the debt, except against the estate of Johnson; the granting of letters of administration on his estate to the defendants Angeline C. Johnson and Stephen B. Johnson; the non-payment of any of the debt; and its existence as a debt against the estate of Johnson, enforceable by the plaintiffs. The prayer is for judgment against Jewett, surviving partner, and against the other defendants, as administratrix and administrator, for \$6,208 51, with interest. Jewett put in a separate answer, containing three distinct defences, to which the plaintiffs put in a replication, which treated the answer as consisting of three pleas, and itself contained two separate pleadings, each of which concluded to the country. The other defendants put in a separate answer containing five separate defences, to which the plaintiffs put in a replication, which treated the answer as consisting of five pleas, and itself contained five separate pleadings, each of which concluded to the country. Each of the replications speaks of the plaintiffs' initial pleading as a "declaration."

The case is before this Court on a writ of error. The record shows that the action was tried by consent, in the District Court, before that Court held by the District Judge, without a jury; that a jury was duly waived by the parties; that the Judge heard evidence, both parties appearing; that he made certain decisions to which the plaintiffs excepted; and that he dismissed the complaint, on the ground of a bar by a statute of limitations. A bill of exceptions was signed, and a judgment was entered dismissing the complaint on the merits, and awarding costs to the defendants. The plaintiffs brought a

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writ of error. No other questions are sought to be reviewed except those arising on the bill of exceptions.

It was held by this Court, in *Town of Lyons v. Lyons National Bank*, (19 *Blatchf. C. C. R.*, 279,) that no question arising on a bill of exceptions could be considered by this Court, on a writ of error to the District Court, in an action at law, where the facts were found by the District Court, without a jury. The question was there fully examined and the following authorities were cited and reviewed: *Guild v. Frontin*, (18 *How.*, 135;) *Suydam v. Williamson*, (20 *Id.*, 432;) *Kelsey v. Forsyth*, (21 *Id.*, 85;) *Campbell v. Boyreau*, (*Id.*, 223;) *United States v. 15 Hogsheads*, (5 *Blatchf. C. C. R.*, 106;) *Blair v. Allen*, (3 *Dillon*, 101;) *Wear v. Mayer*, (2 *McCrary*, 172.) It was held, that the question is one of the power and authority of the Court, and is not such a question of practice, or such a form or mode of proceeding, as is embraced in § 914 of the Revised Statutes, which adopts for the Circuit and District Courts of the United States, in suits at law, the practice of the State Courts; and that there is nothing in § 914 which extends or affects the power of this Court, as it before existed, on a writ of error to the District Court. The want of power consists in this, that § 566 of the Revised Statutes requires that issues of fact, in actions at law, in the District Courts, shall be tried by a jury, and there is no statutory provision for a waiver of a trial by jury, in such actions, and no special statutory power conferred on this Court to consider any questions raised by a bill of exceptions, in such an action not tried by a jury.

It is urged for the plaintiffs in error, that, in regard to the representatives of Johnson, the suit is in the nature of a suit in equity, as the complaint alleges the insolvency of Jewett. The answer to this is, that the plaintiffs, by their pleadings, have treated the action throughout as a suit at law. By § 4,979 of the Revised Statutes, jurisdiction is given to the District Courts, of suits at law and in equity brought by an assignee in bankruptcy against any person claiming an adverse interest touching any property or rights of the bankrupt trans-

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ferable to or vested in the assignee. Under the ruling of the Supreme Court, in *Jenkins v. International Bank*, (106 U. S., 571,) the present suit is either a suit at law or a suit in equity, within the provisions of § 4,979. If a suit in equity, it would be commenced by bill, and the proceedings would be in conformity to the Rules of Equity Practice established by the Supreme Court, as required by General Order No. 33 in Bankruptcy. This has not been done. The plaintiffs, in their replication, call their own first pleading a declaration, and the defendants' pleading pleas, and their replication consists of five pleadings, each of which concludes thus: "and this the said plaintiffs pray may be enquired of by the country, &c." Moreover, they waived a trial by jury, and they made a bill of exceptions, and they sued out a writ of error—all badges of a suit at law and not of a suit in equity. By § 4,980 of the Revised Statutes, it is provided, that "appeals may be taken from the District to the Circuit Courts in all cases in equity, and writs of error from the Circuit Courts to the District Courts may be allowed in cases at law, arising under or authorized by this Title." The fact of the taking of a writ of error establishes that this is a case at law, so far as this Court is concerned. If it were a case in equity, a review by this Court would have to be by appeal, in order to give this Court jurisdiction.

It is urged, that the trial by the Court took place as it would have done in an equity suit; and that, as the case is one reviewable in one or the other of the two modes, the objection to the mode may be waived by the other side, and such waiver has taken place in this case. Some authorities under the State practice in New York are referred to. But the question is one of jurisdiction. The agreement of parties cannot authorize this Court to revise a judgment of the District Court in any other mode of proceeding than that which the law prescribes, nor can the laws or practice of a State, in regard to the proceedings of its own Courts, authorize this Court or the District Court to depart from the modes of proceeding and rules prescribed by the Acts of Congress. (*Kelsey v.*

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Forsyth, 21 How., 85, 88; *Merrill v. Petty*, 16 Wall., 338, 347; *United States v. Emholt*, 105 U. S., 414, 416.)

As the District Court had jurisdiction of the subject-matter and of the parties, and as there is no error in the record, and as nothing found in the bill of exceptions can be considered, the judgment must be presumed to be right, and must be affirmed, with costs. (*Campbell v. Boyreau*, 21 How., 223, 227; *Town of Lyons v. Lyons National Bank*, 19 Blatchf. C. C. R., 279, 289.)

Thomas Corlett, for the plaintiffs in error.

Ruger, Jenney, Marshall & Brooks, for the defendants in error.

THE GOLD AND STOCK TELEGRAPH COMPANY

vs.

FREDERICK PEARCE AND OTHERS. IN EQUITY.

In a suit in equity for infringing a patent, a preliminary injunction was granted as to claims 2 and 3. Before the time for answering had expired, the plaintiff brought a second suit in equity, in the same Court, against the same defendant, for infringing claim 2, and moved for a preliminary injunction, alleging that the apparatus now sought to be enjoined was, in all material respects, so far as claim 2 was concerned, the same apparatus as that enjoined in the first suit. On an objection by the defendant, that the remedy should be by a motion or proceeding in the first suit, the motion was denied, without prejudice to such motion or proceeding.

(Before WHEELER, J., Southern District of New York, February 20th, 1884.)

WHEELER, J. This cause has been heard on the motion of the orator for a preliminary injunction to restrain infringement of the second claim of the orator's patent. In a prior

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suit in this Court, so lately brought by the orator against these same defendants, that the time for answer and taking of testimony has not yet expired, a preliminary injunction, restraining the defendants from infringing this second and the third claims of the patent, has, on motion of the orator, been granted, and is still in force. The time for pleading in bar the pendency of the first suit has not arrived. In an affidavit by an expert filed by the orator on this motion, it is stated, that he is familiar with the patent, and made an affidavit on the former motion, and that the apparatus claimed to be an infringement on this motion "is, in all material respects, so far as the second claim is concerned, the same apparatus as that enjoined in the previous motion."

The defendants object to this mode of procedure by a new bill, and cite *Wheeler v. McCormick*, (8 *Blatchf. C. C. R.*, 267.) The orator insists, that it is proper to file successive bills for successive infringements, and cites *Higby v. Columbia Rubber Co.*, (18 *Fed. Rep.*, 601.) It is also urged, in support of the orator's position, that the prior suit could not be maintained on an infringement subsequent to the filing of that bill, only, while this may be, and that may fail and this succeed. That is one ground stated by Woodruff, J., for maintaining the second suit, in *Wheeler v. McCormick*, although the principal ground was, that the prior suit was in another District and Circuit. That reason does not obtain here, however, as this case now stands, for it is adjudged in the prior suit, and that adjudication still stands insisted upon by the orator, that there was an infringement prior to the filing of the former bill, sufficient to uphold it to an accounting and final decree. That the accounting in that case would extend to the time of taking, and cover the infringement now aimed at, is not at all questioned. That distinguishes this case from what was said by Lowell, J., in *Higby v. Columbia Rubber Co.* There, the account had been closed, and, although the former injunction was in force, a new bill would be necessary to full relief for the new infringement. It is also urged, that, as a proceeding for contempt would be a harsher

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remedy than a motion for a new injunction, the injunction might be granted on a case on which the defendants might not be adjudged guilty of contempt of the former one; and, especially, where the proof would consist of *ex parte* affidavits. But, the processes of Courts of equity are so flexible and capable of being tempered to the justice and necessities of every case, at all its stages and in all its phases, that the difference between the forms does not seem to be important. As these cases are now situated, the modes of proof, on proceedings for contempt of the former injunction, would or might be precisely the same as upon this motion. The question whether the device sought now to be restrained infringes the second claim is precisely the same as that whether it violates the former injunction. If it is not wilful, it need not be visited with punishment as such. As the case is presented, the question to be decided is precisely the same as that before decided between the same parties, the adjudication of which is in force, and covers all that is asked for here. If it were necessary, or more fair, or more desirable, to make the former injunction more specific, by being directed at some device which the orators claim to be an infringement and the defendants that it is not, that end can be reached by motion in the pending cause, as well as by a new bill. Multiplicity of suits should be avoided when practicable, and this multiplicity may well be avoided here. Under the circumstances of this case, this motion is denied, but without prejudice to any motion or proceeding in the original cause.

Edward N. Dickerson, Jr., for the plaintiff.

*Roscoe Conkling** and *Samuel A. Duncan*, for the defendants.

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HENRY A. BRASSEY

vs.

THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY
AND OTHERS. IN EQUITY.

Where a railroad corporation, with its well-known obligations to the public, ~~has~~ become entirely insolvent and unable to pay the interest upon its secured debts, unable to pay its floating debt, unable to borrow money, and is in peril of the breaking up and destruction of its business, and confesses this inability, a case has arisen where, upon a bill filed by a mortgage bondholder, for an injunction against attacks upon the mortgaged property and a receivership to protect the property of the corporation against peril, a temporary receiver may be appointed, although no default has yet taken place on the securities owned by the plaintiff, but a default is imminent and manifest.

The receivership in this case was not the result of any plan to injure the corporation or the holders of its securities, nor was the suit collusive between the parties, in the sense of a fraudulent collusion to deceive the Court, and thereby to accomplish selfish and improper purposes.

(Before SHIPMAN, J., Connecticut, March 7th, 1884.)

SHIPMAN, J. The petitioners have put their case upon the ground, that neither the allegations of the original bill, nor the facts in regard to the New York and New England Company existing at the time of the appointment of the receiver, justified the order, but that, on the contrary, the institution of the suit and the procurement of the vote of the directors, at a special meeting, assenting to the proposed appointment, were a plan on the part of sundry directors and the president to injure the corporation, perhaps, for selfish purposes. On the other hand, the corporation and the trustees of the second mortgage have placed their opposition to the revocation of the order, in part, upon the fact that the present acknowledged financial condition of the corporation demands a receivership, and that the taking the road out of the hands of a receiver, in view of the pendency of three petitions before three legislatures, for ad-

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ditional legislative authority to raise money, (the petitions being based upon the financial necessities of the corporation,) would put the corporation in the midst of perplexities and dangers from which it is now relieved, and would imperil the success of any attempt to place the corporation in a condition of solvency. It is, of course, apparent that, in their opposition to a revocation of the order, the trustees of the second mortgage bonds and the corporation have a great leverage from the fact that the business community, the shippers of freight, and the creditors of the corporation, are now perfectly aware that the company has not been able to pay its debts, has lived by borrowing and by the grace of a portion of its creditors, and from a natural fear of danger which might result from putting the corporation back into a condition where it might not be able either to serve the public or to help itself. The position which the Commonwealth of Massachusetts, by virtue of its ownership of about seventeen twenty-eighths of the whole number of outstanding second mortgage bonds, has taken in regard to the receivership, is, also, in this part of the case, entitled to much respect. But it is not my purpose to dispose of this motion upon such considerations.

The petitioners have given voice to their suspicions, not to say their accusations, that this receivership was the result of a plan to injure either the corporation or the holders of its securities, and that the suit was collusive between the parties, in the sense of a fraudulent collusion to deceive the Court, and thereby to accomplish selfish and improper purposes. If this is true, it is the duty of the Court either to set aside the order or to remove the receiver. I, therefore, propose briefly to examine into the facts and see whether there was or was not a necessity, arising out of the financial condition and circumstances of this road, for the appointment of a receiver, and to look into the validity of the charges or suspicions of collusive fraud, recognizing the fact, that the changed position and relations of the active petitioners in regard to the controlling management of the corporation, resulting from the election of directors in the early part of December, might naturally en-

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gender suspicions in their minds, either of the good faith or of the propriety of the conduct of the new board, although those suspicions might not be well founded. And I re-examine the condition of things on December 31st, 1883, with reference to a receivership, with the more willingness, because it has been stated here, that it was said in another Court, that, probably, if I had known all the facts, the order would not have been granted.

Previous to the annual election of directors of the corporation, Lee, Higginson & Co., gave public notice, by advertisement, that an attempt would be made to elect a new and different board, intimating plainly a dissatisfaction with the policy of the existing management, and solicited the proxies of the stockholders for that purpose. This attempt was openly and plainly proclaimed, and resulted in dropping from the board General Wilson, the former president, and Messrs. Grant and Cannon, who, apparently, were efficient financial friends of the existing management. Colonel French, who was also on friendly terms with these gentlemen, was re-elected, and Mr. Kingsbury, a member of the board for many years, was also re-elected. Whether others of the old board were re-elected I do not know.

The report of the retiring president showed that, from various causes, the road had not, during the year ending September 30th, 1883, earned its fixed charges. Promptly with the announcement of the probable or actual result of the election, Mr. Cannon and the firm of which Mr. Grant is a member demanded and received payment of demand notes against the company, amounting to \$104,000. I do not speak of this action as unnatural or improper, but simply as one of the financial facts of the case. The retiring directors probably thought it not improper that they should no longer be obliged to address themselves to the work of providing means to sustain the credit and pay the overdue debts of the company.

The new board, as appears both from the official record of their action, and as appeared more in detail upon the original hearing, found themselves compelled to turn early and prompt

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attention to this subject, and found the company in unexpected straits for money. The pressing debts were, apparently, larger than they had anticipated. No money was in the treasury to meet the interest on the first mortgage bonds maturing on January 1st. There was no money to pay the old debts due to connecting roads. Money could not be spared to pay maturing notes except under supposed compulsion. The directors set themselves to the task of borrowing money to meet pressing obligations. It was estimated that some \$800,000 were needed, and that but about \$300,000 could be promised. At this point, in reply to a letter from Mr. Clark, was received a letter from the president of the Erie Railroad Company, in which Mr. Jewett stated that he desired payment of \$90,000 of the debt of \$190,000 due that company, and that \$100,000 might remain for a time. Payment of the January interest could neither be made from the receipts of the New York and New England road, nor could the money be borrowed. A plan was projected and finally carried into effect, that the January coupons should be cashed or bought by money furnished by the persons interested in the road, and held until the succeeding July, and that \$10,000 should be furnished by the company, in consideration of this forbearance, and as commissions for the services of the bank which was to receive and disburse the money. Notice to all creditors and to the public was thus given of the company's inability either to pay their interest or to borrow the money with which to pay it, and that the company was without either money or adequate credit. For the purposes of the present inquiry, an examination of the causes which had brought about this result would neither be gracious nor useful; neither have I sufficient data to state them with accuracy. The fact that the corporation was at a standstill, so far as the payment of its debts and obligations was concerned, existed. The fact that no duty existed upon the directors or upon the stockholders to lend money upon unsecured notes, and thus to meet these obligations, seems to me to be plain. The directors owed two duties—one to the public, that this road should be kept in running condition, so that

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it could serve the public ; the other to the stockholders and to the bondholders, that, if possible, the property might be kept intact and preserved, so that, finally, unsecured and secured creditors might, if possible, be paid and the stock might be saved ; and they were called upon to take all proper measures to discharge these two duties. At this time, probably from the 27th to the 31st of December, the question of temporary relief, by a receivership, from the peril in which they found the corporation, undoubtedly presented itself to the minds of the directors. It would be natural that the idea of protection to the property and benefit to the public through such an instrumentality should have suggested itself. On the 31st of December, the agent of the syndicate which had agreed to take second mortgage bonds, and thus provide the means for the payment of the expenses of double tracking the road, the proceeds of the bonds to be used only for work already done, refused to answer the call which was made upon him to take and pay for 170 bonds. I do not propose to consider the propriety or impropriety of the refusal, but, on the contrary, to assume that the agent took the proper course. It is a fact in the case, and a fact which, taken with other occurrences of that day, led the president to believe that not only no more bonds would be taken, and, therefore, the double tracking of the road must be stopped, but, also, that Messrs. Cannon, Grant and French were planning themselves to procure the appointment of a receiver who would act in harmony with them, and in hostility to the new policy of the new board, if that policy should prove to be a radical departure from the system of the old board.

In pursuance of authority which had been previously given by the board to call special meetings, the president called a meeting of his board at Hartford, on the evening of December 31st, to act upon the question of agreeing or consenting to the appointment of a receiver. Messrs. Clark, Nickerson, Higginson and French left Boston on the same train, and the silence of the three first named gentlemen in reply to Colonel French's questions in regard to the object of the proposed

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meeting, is seriously criticised. The answer to these criticisms is, that they honestly believed, that, if he was informed of the object before the hour of meeting, he could take prompt and efficient measures to communicate with his friends and obtain a hostile receivership in the Courts of the State of New York. Their silence and expedition led him to distrust their good faith. This mutual distrust was the cause of the subsequent excitement which attended the issuing of the order. Messrs. French, Cannon and Grant all deny, under oath, that the suspicions were well founded, or that they had any knowledge or privity in such a design, and there is no evidence before me which casts doubt upon the truth of the denial. Neither is there any more room to doubt that the other directors really believed that they were only endeavoring to forestall similar action on the part of the gentlemen whom I have named. When the meeting was held, a quorum of seven was present, and a vote approving of a receivership was carried by a vote of five to two. This action was, at a meeting held on January 7th, deliberately approved by a large majority of all the directors. At the hearing on the evening of the first meeting, Colonel French urgently opposed the granting of the order. The case resolved itself to this—the inability of the corporation to pay its coupons and its other debts was admitted. The expedient which had been adopted for the payment of the coupons was explained. The plan which all parties then agreed was the only feasible plan by which to raise money was, to obtain the requisite permission from the legislatures of Massachusetts, Connecticut and Rhode Island, and, also, from the requisite number of the existing second mortgage bondholders, to issue second mortgage bonds in payment of the floating debt, a proceeding which would evidently require time and care. Colonel French was of the opinion that no danger would arise from attachments, or cessation of business from connecting roads, or from any other adverse causes, while these applications were pending. The other gentlemen thought that the corporation would be put into great hazard as soon as the knowledge of their actual in-

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ability to pay their January interest was known, and that the announcement of this fact would be a signal for the commencement of hostilities. Mr. Kingsbury, the trustee of the second mortgage, who resided in Connecticut, and who has long been a director of this road, and had given much time and thought to the affairs of the company, reluctantly assented to the necessity of a receivership. I believed then, and still think, that the condition of the corporation was such that there was not only no safety, but that there was absolute and imminent peril to all the interests of stockholders, bondholders and creditors, if a receivership should be refused, and that the welfare of all the various interests required that the corporation should temporarily be placed in a position where hostile arms could not attack it. The corporation is now enabled actively and efficiently to discharge its obligations to the public, from the fact that it is under protection. Subsequent events simply confirm the conclusion to which I then came. It could not even now do business unless it had been permitted to use some of its receipts to pay a part of the outstanding debts due to connecting roads. The receiver has been seeking from the Connecticut legislature the remission of taxes which are a first lien upon the Connecticut real estate of the company. A receivership by some Court was inevitable.

The question still remains to be considered—was the institution of the suit, and the efforts on the part of the directors to promote it, an attempted fraud upon any one? I have carefully listened to the facts and suggestions and inferences which have been stated by the counsel for the petitioners, and I can discover no actual trace of a desire to injure the property or securities, or the honest and true character, of the company. I see circumstances which a mind pre-disposed to suspicion can easily fasten upon as indicative of a sinister and indirect motive. The petitioners were carrying a large amount of the second mortgage bonds, and would naturally distrust action which would depreciate the market value of these securities, but, when the circumstances are looked at in the

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light of other existing facts, the idea of attempted fraud disappears. I am at a loss to find where the fraud exists, when the pecuniary condition of the company is really understood. If the directors had in mind the wrecking of the road, they could have done it easily by not favoring a receivership.

At the time when the order was granted, the substantial facts which have been stated were apparent, except that I do not now recollect that the refusal of the syndicate to take the bonds, or the payment of the notes to Cannon and Grant & Co., were adverted to, and except that the relations between some of the directors who favored a receivership and some of the members of the old board were not clearly understood by me. The facts in regard to the pecuniary condition of the company, and the impossibility of any immediate ability to obtain more money, and thereby gain relief, were clearly perceived.

Upon this hearing, the conduct of the receiver since his appointment, in closing his fast through freight contracts with the New York, Lake Erie and Western Railroad Company, and his printed statements or reports in regard to the financial condition of the company, have been criticized. If the traffic arrangements resulted, through too low rates to the New York and New England road, in constant pecuniary loss to the company, I can see no propriety in continuing the contract, and in continued pecuniary losses. In regard to his financial exhibit, I have heard no adequate reason to doubt its truth, and it was certainly his duty to inform the stockholders and the bondholders of the exact condition of the company.

Were the allegations of the bill sufficient to justify the appointment of a receiver? The petitioners' position is, that, ordinarily, to justify such an appointment, a case must be pending in which other and principal relief is sought, as to foreclose a mortgage. It is true, that, in general, a receivership is ancillary or incidental to the main purpose of the bill, but it does not follow, that, where a case is presented which demands the relief which can be best given by a receivership,

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such relief must be refused because the time has not arrived when other substantial relief can be asked. For example, although, as a rule, a mortgagee cannot ask for relief until his mortgage debt has become due, he can go into a Court of equity before that time has arrived, and ask for an injunction and a receiver, to prevent the subject-matter of his mortgage from being impaired and wasted, as was said in *Long Dock Company v. Mallery*, (12 N. J. Eq., 431 :) "The power of the Court to preserve the pledge from destruction, to answer the exigency of the mortgage, is undoubted." "If the bill shows a case for an injunction and a receiver, the exercise of that power is called for, although the time of payment set in the mortgage has not yet come, unless the equity of the bill is met by the answer." This bill alleged the existence of the corporation and the first and second mortgage bonds, and the actual inability of the road to pay its interest to become due on January 1st; the existence of the floating debt and its inability to pay that; the intention of some of the creditors to attach the mortgage property; the peril to the road arising from anticipated attachments of the property covered by the second mortgage, and by the loss and breaking up of the business of the road, from its inability to pay connecting lines, and its consequent inability to pay the interest due on February 1st; in brief, it alleged the insolvency of the road, though not in terms, and the danger and hazard of serious injury to the revenue of the company unless suits were prohibited, and those who did business with it were assured that its current expenses were to be paid. These allegations were admitted both by the corporation and by the trustees of the second mortgage. I am of the opinion, that, when a railroad corporation, with its well-known obligations to the public, has become entirely insolvent and unable to pay the interest upon its secured debts, unable to pay its floating debt, unable to pay the sums due its connecting lines, unable to borrow money, and is in peril of the breaking up and destruction of its business, and confesses this inability, although no default has as yet taken place upon the securities owned by the orator, but a default is imminent and manifest, a case has arisen where, upon a bill for

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an injunction against attacks upon the mortgaged property and a receivership to protect the property of the corporation against peril, a temporary receiver may properly and wisely be appointed.

It is next said that this was a case of collusion between the orator and the railroad corporation. There is no claim that there was any collusion on the part of the second mortgage trustees. If by collusion it is meant that the preparation for, and institution of, the suit were known and desired by the directors, or some of them, in the belief that the granting of the prayer of the bill would be prudent and wise, then there was collusion. If by collusion it is meant that the institution of the suit or its management was marked by fraudulent design or purpose, then there was not collusion. The complainant was the actual owner of five mortgage bonds. They were not placed in his hands, and were not transferred to him fictitiously, and were not bought by him for the purpose of the suit. The firm of Lee, Higginson & Co. had the authority to bring suit in his name, or their action has been ratified and approved. The railroad company consented, prior to coming into Court, to the appointment, as is frequently and properly the course in cases of this kind. No one attacks the fidelity of the second mortgage trustees, and they also assented.

In regard to the prayer of the petition for the removal of the receiver, no adequate reason has, in my opinion, been given for such a course. The affidavits of the second mortgage trustees contain a sufficient reason why such a prayer should be denied.

In regard to the prayer of the petition for the appointment of a co-receiver, I see no reason for antagonistic receivers, and a receiver who should be in accord with Mr. Clark would not, probably, be satisfactory to the petitioners.

The prayer of the petition is denied.

William D. Shipman and *Henry D. Hyde*, for the petitioners.

Simeon E. Baldwin, *William Caleb Loring*, and *Moorfield Story*, opposed.

THE UNITED STATES, PLAINTIFFS IN ERROR.

vs.

JOHN L. WHITE, ASSIGNEE, & CO., DEFENDANT IN ERROR.

An obligation or promise in this form: "Due the bearer one dollar, in goods, at our store, Kennedy, N. Y., Oct. 14, 1878. Aldrich, Sweetland & Co.," is not a "note used for circulation" within § 19 of the Act of February 8th, 1875, (18 *U. S. Stat. at Large*, 811,) and the promisors are not liable to a tax thereon.

(Before WALLACE, J., Northern District of New York, March 18th, 1884.)

WALLACE, J. This is a writ of error to the District Court for the Northern District of New York, brought to review a judgment of that Court in favor of the defendant. The first question presented by the bill of exceptions is, whether certain obligations, issued by the firm of Aldrich, Sweetland & Co., are liable to taxation, under § 19 of the Act of Congress of February 8th, 1875, entitled, "An Act to amend existing customs and internal revenue laws, and for other purposes," (18 *U. S. Stat. at Large*, 311.) Section 19 reads as follows: "Every person, firm, association, other than national bank associations, and every corporation, State bank, or State banking association, shall pay a tax of ten *per centum* on the amount of their own notes used for circulation, and paid out by them." The firm of Aldrich, Sweetland & Co., merchants, had issued, paid out, and put into circulation, in the neighborhood of their place of business, their obligations or promises to pay in goods at their store, varying in amount from five cents to five dollars each, and amounting, in the aggregate, to nearly five thousand dollars, in form as follows: "Due the bearer one dollar, in goods, at our store, Kennedy, N. Y., Oct. 14, 1878. Aldrich, Sweetland & Co."

If the meaning of the term "notes used for circulation" could not be satisfactorily ascertained by a reference to other

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Acts of Congress *in pari materia*, the question presented would be a more doubtful one, because, although such promises to pay are not negotiable notes, inasmuch as they are not payable in money, they are notes, within the generally accepted meaning of the word. A literal reading of the section would subject to taxation every note an individual might execute and deliver, unless there is some special meaning to the term "used for circulation;" yet no one would contend that the section was designed to have this extended application. More especially would such a construction be a startling one, in view of the provisions of § 20 of the same Act, which imposes a tax of ten *per centum* on the notes of every person, firm, or corporation, used for circulation by other persons, firms, and corporations. It is not to be supposed that Congress intended, by the Act in question, to subject all promissory notes circulating in the business of the country to a tax of ten *per centum*—a tax double that imposed in 1862 to meet the exigencies of the war to preserve the Union. It is, therefore, necessary to look for some more restricted meaning of the term "notes used for circulation." That meaning may be found by a reference to other provisions in the laws of Congress *in pari materia*, which, upon familiar rules of construction, should always be considered in solving questions of the interpretation of statutes. By such reference it will appear, that "notes used for circulation," "circulating notes," and "circulation," as that word is used in relation to the instrumentalities of banking operations, are equivalent and synonymous terms. Section 21 of the Act in question provides how the tax imposed by § 19 shall be returned and collected, and, instead of the words "notes used for circulation," uses the words "circulating notes." The context of the three sections, 19, 20 and 21, shows, plainly, that the taxes within the contemplation of Congress, and the subject-matter of the legislation, are those relating to banking capital in the hands of corporations and individuals. According to the scheme of the existing internal revenue laws, those taxes are imposed not only on the capital directly employed, but also upon the deposits and

circulation incident to banking operations. The word "circulation," in this connection, is defined by the lexicographers as "currency," or "circulating notes or bills, current for coin." (*Webster*.) That this is the subject of taxation in the sections in question is obvious, because these sections in the Act of 1875 are a substitute for the pre-existing provisions of law respecting the taxation of banks and bankers, as found in the third clause of § 3,408, of the Revised Statutes. That clause imposed a tax of "one-twelfth of one *per centum* each month upon the average amount of circulation issued by any bank, association, corporation, company, or person, *including as circulation* all certified checks and *all notes and other obligations calculated or intended to circulate or to be used as money.*" In lieu of the tax of one-twelfth of one *per centum* a month upon notes "calculated or intended to circulate as money," thus imposed, the Act of 1875 imposes a tax of ten *per cent. per annum* on "notes used for circulation." Both the earlier and the later law deal with the same persons, the same business, and the same subject of taxation; but the later Act, in harmony with the general legislation of Congress since the close of the war, lightens the burden imposed. It thus seems clear, that the "notes used for circulation," taxed by the Act of 1875, are notes calculated or intended to circulate for money. That obligations or notes of the character put forth by the makers here are not obligations intended to circulate for money, was distinctly held by the Supreme Court, in *United States v. Van Auken*, (96 U. S., 366.) In that case, the defendant was indicted for paying out and circulating similar obligations, under an Act of Congress declaring that no private corporation, firm, or individual, should make, issue, circulate or pay out any note or other obligation for a less sum than one dollar, *intended to circulate as money*; and the Court decided, that, as such obligations were not solvable in money, but only in goods, there was no offence, within the meaning of the statute.

As the obligations in question were not circulating notes, or notes used for circulation, as that term is used in the Act

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imposing the tax, it is unnecessary to consider the other questions which are presented by the bill of exceptions, and the judgment of the Court below is affirmed.

Martin I. Townsend, (*District Attorney*), for the plaintiffs in error.

John L. White, defendant in error, in person.

GEORGE L. RICH vs. THE TOWN OF MENTZ.

As a pending case, presenting the same question, involved a sufficient sum to be reviewed by the Supreme Court, and was to be presented to that Court, this Court, both judges concurring, stayed all proceedings in this case, and refrained from entering a judgment, until the decision in the other case, on writ of error, or until the further order of this Court.

The views of Wallace, J., in *Cowdrey v. Town of Caneadea*, (21 *Blatchf. C. C. R.*, 351,) were adhered to by him, and those of Coxe, J., in *Rich v. Town of Mentz*, (*Id.*, 492,) and *Chandler v. Town of Attica*, (*Id.*, 499,) were adhered to by him, as to the construction of the Act of the Legislature of New York, chap. 925 of the Laws of 1871, in regard to town bonds.

(Before WALLACE and COXE, JJ., Northern District of New York, March 17th., 1884.)

WALLACE, J. The same questions arise in this case as were presented in *Cowdrey v. Town of Caneadea*, (21 *Blatchf. C. C. R.*, 351,) where it was ruled, that the bonds of the town were void because the county judge did not adjudicate that the requisite majority of tax-payers had consented to the creation of the bonds. No reasons have been advanced, in the arguments of counsel, that are deemed sufficient to change the conclusions reached in the Caneadea case. It is proper, however, to advert to an argument that was urged in that case, and considered but not discussed in the opinion, and

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which has been urged again here. It is insisted, that, because the amendatory Act of 1871, (*chap.* 925,) defines the term tax-payer, "when used in this Act," to mean such tax-payers as are not assessed for dogs or highway tax only, it is not necessary to comply with the explicit language of the Act as to the form and substance of the petition.

The petition is the basis and groundwork of the whole bonding proceeding. When the amended Act was passed, many of these proceedings had been set aside by the Courts of this State because of defects of form in the petition, and it was the well settled law of the State Courts, that any such defect was jurisdictional, and rendered the whole proceeding futile. Speaking of the Act of 1869, (*chap.* 907,) the Court of Appeals said, in *The People v. Smith*, (45 *N. Y.*, 772 :) "that the authority conferred by the Act must be exercised in strict conformity to, and by a rigid compliance with, the letter and spirit of the statute. The first section of the amended Act provides, in language as explicit as could be employed, that the petition, verified by one of the petitioners, shall set forth that the petitioners are a majority of tax-payers of the town, who are taxed or assessed for property, "not including those taxed for dogs or highway tax only." It subsequently provides, that the word tax-payer, "when used in this Act," shall mean "any corporation or person assessed or taxed for property, * * * not including those taxed for dogs or highway tax only." Section 2 makes it the duty of the county judge "to proceed and take proof as to the said allegations in said petition," and, if he finds that the requisite majority of tax-payers have consented, he shall so adjudge. If there were no express provision requiring it to appear in the petition that the tax-payers who apply are a majority of the designated class, the petition would, doubtless, be sufficient if it alleged that they were a majority of the tax-payers of the town. And, in this view, there was no need of amending the Act of 1869 in this behalf. If the argument for the plaintiff is sound, this explicit provision is meaningless. It is not to be assumed that the legislature did not mean anything by the

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language which they so carefully employed. It is not difficult to apprehend what the legislature meant by defining the word "tax-payer." It occurs several times in the Act. It was defined for convenience, in order to avoid repetition of description, whenever the word was used in the Act, and, in order that there should be no room for doubt what kind of a taxpayer was meant whenever the word was used.

As it seems to me, the real question in this case is, not whether the county judge made an adjudication which is binding upon the defendant, under the rules of law which control a Court or officer exercising a special statutory power, and which require every step to be in strict conformity with the statute which confers the power, but whether the Acts of the legislature are not to be treated as creating a jurisdiction of a special character, which cannot be assailed collaterally, but in which all errors of fact and of law, even those respecting the existence of jurisdictional conditions, are to be corrected in the proceeding itself, upon a review by the appellate tribunals. There is much to be said in support of the latter suggestion. (*Munson v. Town of Lyons*, 12 Blatchf. C. C. R., 539.)

As one of the cases now pending in this Court, and presenting the same question as this, involves a sufficient sum to be reviewed by the Supreme Court, and is to be presented to that Court, all proceedings in this case will be stayed, and no judgment be entered, until the decision of that case on writ of error, or until the further order of this Court.

COXE, J. I concur in the disposition made of this case; but, for the reasons heretofore stated by me, (*Rich v. Town of Mentz*, 21 Blatchf. C. C. R., 492, and *Chandler v. Town of Attica*, *Id.*, 492,) I cannot agree with the Circuit Judge in the construction placed by him upon the Act of 1871.

James R. Cox, for the plaintiff.

F. D. Wright, for the defendant.

Coghlan v. Stetson.

CHARLES J. COGHLAN *vs.* JOHN STETSON.

By a written agreement made at London, between S., the manager of a theatre in New York, and C., an actor, of London, C. agreed to act, for 7 months, as leading man of that theatre, in such plays as should be given there, and in such other theatres as S. should direct, in the United States and Canada; C. to pay his own expenses to New York; 7 performances each week to constitute a week's business; S. to select the plays; S. to pay C. \$100 "for each performance in which he shall appear;" C. not to perform in any theatre in the United States or Canada till the contract should be fulfilled; S., by giving notice, to have the right to continue the contract for 6 weeks more. C. went to New York and acted at said theatre for 5 weeks. Then S. refused to let him act for 3 weeks, and refused to pay him his salary, \$2,100, for that time. Afterwards, C. acted for S. and was paid by him under the agreement. In a suit for the 3 weeks' salary: *Held*,

- (1.) S. was required by the contract to permit C. to act, and C. was entitled to his salary although he did not "appear;"
- (2.) C. did not lose any right, by afterwards acting for S. and being paid therefor;
- (3.) C. was allowed to amend his complaint so as to recover the \$2,100 as damages instead of wages.

(Before COXE, J., Southern District of New York, March 17th, 1884.)

COXE, J. On the 31st of August, 1883, the parties to this action executed the following contract: "This agreement, made and entered into this thirty-first day of August, in the year of our Lord one thousand eight hundred and eighty-three, by and between John Stetson, of Boston, in the county of Suffolk and Commonwealth of Massachusetts, manager of Fifth Ave. Theatre of New York, of the first part, and Charles F. Coghlan, of London, England, of second part, witnesseth, that the said party of the second part contracts that he shall give his professional services, as leading man of the Fifth Avenue Theatre, New York, in such dramatic performances as shall be given in said theatre, also in such theatre in cities in the United States and Canada as said party of first part may direct, for a season beginning October 8th, 1883, and ending Saturday evening May 3d, 1884. It is understood

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and agreed, that, when said party of second part shall play in any theatre outside of New York, he shall have his name featured on all printing and advertisements, and be recognized as the stock star of said Fifth Avenue Theatre Company. Said party of second part agrees to furnish all his costumes and to pay his own fare and expenses to New York. Said party of first part agrees to pay railroad fares for party of second part, including sleeping cars and transportation of luggage, should party of second part be required to play in any other theatre outside of New York, during this engagement. Said party of the second part agrees to report for rehearsal, in New York, on or before Monday, September 24th, 1883, and be in readiness to perform Monday, October 8th, 1883. It is understood and agreed, that seven performances each week shall constitute a week's business, but, whenever it is customary in theatres to give more than that number, said party of second part shall give that number of representations. Said party of the first part shall have the selections of the plays to be presented at each entertainment in which party of second part shall appear. Said party of first part agrees to pay party of second part the sum of one hundred dollars (\$100) for each performance in which he shall appear, settlement to be made on the regular salary day of the theatre. Said party of second part agrees that he will not perform in any theatre in the United States or Canada till this contract shall have been faithfully fulfilled. In witness whereof, we have hereunto set our hands and seals. John Stetson. [L. s.] Charles F. Coghlan. [L. s.] It is further understood, that said Stetson can continue this contract for six weeks, by giving said Coghlan notice to that effect on or before March 1st, 1884." The plaintiff came to this country in September, 1883, commenced acting at the Fifth Avenue Theatre, New York, on the 8th of October, and continued until the 10th of November, 1883; a period of five weeks. On the evening of the latter day, having discovered that his name was omitted from the play advertised for the ensuing week, he called upon the defendant and was informed that his services would

not be required for an indefinite period. The plaintiff protested, and notified the defendant of his entire willingness to play, and that, if he was compelled to remain idle, through the defendant's neglect, he should insist upon being paid at the rate of \$700 per week. The plaintiff was not permitted to play for three weeks. He demanded his salary for this period, and was refused. Subsequently, he appeared at Boston, under the defendant's auspices. This action is to recover \$2,100, alleged to be due, under the contract, for the three weeks aforesaid, commencing Monday, November 12th, 1883.

It is argued that the plaintiff cannot recover, for these reasons: *First*. He did not "appear" during the period aforesaid, and the defendant was not required by the contract to permit him to appear. *Second*. Having subsequently accepted payment at the rate of \$100 for each performance in which he appeared, the plaintiff is estopped from claiming payment when he did not appear. *Third*. The defendant does not agree to employ the plaintiff. The agreement is by the plaintiff only, to render services for the defendant. *Fourth*. In any event, the complaint is defective. The action should have been for damages.

The principal controversy arises upon the construction of the written contract, and must be determined by that instrument alone. The interpretation contended for by the defendant is so harsh, so unfair, so wanting in reciprocity, that the Court should not hesitate to reject it, provided the instrument is susceptible of any reasonable construction. According to the defendant, no obligation rests upon him to do anything. The plaintiff, on the other hand, who, to use the language of the defendant's brief, was "an actor of fame and success in England," is required to leave his home and his profession there, cross the Atlantic at his own expense, pay his board in this country from September 24th till May 3d, and, possibly, for six weeks thereafter, furnish his own costumes, remain at the beck and call of the defendant for seven months, and refuse all other employment. To all this the plaintiff is bound, and the defendant is not bound at all! In other words, the

plaintiff must cross three thousand miles of ocean, lose time, money and reputation, and, if it suits the fancy or whim of the defendant to put some other actor in his place, he is wholly remediless; he cannot compel the payment of a single dollar.

The charge that this interpretation is severe is not strenuously denied by the defendant, but he insists that the contract is one which the plaintiff was at liberty to make, and, having made it, he must abide the consequences. Undoubtedly, this is so. If the plaintiff made such a contract he cannot recover. But, whether he made it or not is the precise question involved. If the language used clearly establishes the defendant's version, it would, unquestionably, be the duty of the Court to enforce it. But, where the exact meaning is in doubt, where the language used is contradictory and obscure, if there are two interpretations, one of which establishes a comparatively equitable contract, and the other an unconscionable one, the former construction should prevail. In such cases, the Court may well assume that the parties do not intend that which is opposed alike to justice and to common sense. Unless the language is so definite and certain that no other interpretation can be upheld, a construction should not be adopted which must inevitably cast a reflection upon the sanity of one of the contracting parties.

The contract contains several clauses which, read separate and apart from the context, sustain the defendant's version, and they have been pressed upon the attention of the Court with much learning and ingenuity. But, taken as an entirety, read as one instrument, read in the light of surrounding circumstances, it must be said that the plaintiff's construction is the true one.

The contract provides, among other things, that the plaintiff is to be leading man in such dramatic performances as shall be given in the Fifth Avenue Theatre during the season of 1883-84. It is then mutually agreed that seven performances each week shall constitute a week's business. The plaintiff agrees to appear seven times a week, and the defend-

ant agrees that he will employ the plaintiff at least seven times a week. The provision is as binding on one of the parties as on the other; neither can avoid it. The defendant agrees to pay the plaintiff \$100 for each performance *in which he shall appear*. The clause in italics is the one upon which the defendant bases his principal argument. It is possible that these words are unnecessary, that the contract would be perfect without them, and yet, taken in conjunction with the stipulation as to the number of performances each week, there is little difficulty in reconciling them with the other clauses. The contract would then read, in substance: "The party of the first part agrees to pay the party of the second part the sum of one hundred dollars for each performance in which he shall appear, and it is understood and agreed that seven performances each week shall constitute a week's business." The plaintiff shall be paid for the seven performances, but for no more, unless he actually appears in more. The clause referred to was, also, a wise provision in case the plaintiff, through sickness or otherwise, neglected to appear.

I am unable to see how the plaintiff waived any of his rights by his subsequent appearance at Boston. His action in that regard was entirely consistent with his theory of the contract. By accepting pay under the contract, he did not accede to the defendant's interpretation to any greater extent than the defendant acceded to his by paying the amount due.

The objection that the defendant does not agree to employ the plaintiff has already been disposed of. If it were necessary, the law would imply an agreement to employ him during the stipulated period, the plaintiff having entered upon the discharge of his duties under the contract, and rendered services for the defendant, which were accepted by him. But, there is here an express agreement. The contract is not unilateral. The one party agrees to act, and the other agrees to pay.

Regarding the objection disputing the plaintiff's right to

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maintain the action in its present form, it is sufficient to say, that, upon the trial, the plaintiff asked leave to amend the complaint, so as to meet the criticisms of the defendant. This request should be granted. It is not the policy of modern procedure to defeat a party who has a meritorious cause of action, because he has not declared in the right form, especially when all of the facts are disclosed and the opposite party is not misled. The fault here pointed out is, that the plaintiff seeks to recover a sum of money *as wages*, which he should recover *as damages*. The objection, though, quite likely, it is well founded, is a formal and technical one. Every element of surprise is wanting. Had the complaint been in the form suggested, the result would, inevitably, have been the same.

It is said that the defendant should be permitted to offer, in mitigation of damages, proof that the plaintiff could have obtained an engagement elsewhere during the time he remained idle. The short answer is, that, by the terms of the contract, the plaintiff expressly bound himself "not to perform in any other theatre." He could not have accepted a position under another management without himself violating the contract.

The amendment is within the discretion of the Court, and is one which clearly should be allowed. To withhold it would simply protract litigation, without change of result.

The plaintiff is entitled to the judgment demanded in the complaint.

Olin, Rives & Montgomery, for the plaintiff.

A. J. Dittenhoefer, for the defendant.

JAMES J. HICKS

vs.

FERDINAND G. OTTO AND OTHERS. IN EQUITY.

Re-issued letters patent No. 10,189, granted to James Joseph Hicks, as assignee of L. Peroni, August 29th, 1882, for an improvement in thermometers, the original patent, No. 222,420, having been granted to said Peroni, December 9th, 1879, are valid.

Claim 1 of the re-issue, namely, "A thermometer having its bore in rear of or beyond the mechanical axis or centre of the convex surface through which it is viewed, as and for the purpose described," is not a broader claim than claim 1 of the original, namely, "A thermometer tube having its bore out of or beyond the mechanical axis or centre, as and for the purpose described."

The description in the original patent set forth, as the invention, what is claimed in claim 1 of the re-issue; and there was nothing in the state of the art to limit the invention to anything less than what is covered by that claim.

The questions of prior use, novelty and infringement considered.

(Before WALLACE, J., Southern District of New York, March 18th, 1884.)

WALLACE, J. Infringement is alleged of the first and second claims of re-issued letters patent No. 10,189, granted August 29th, 1882, to James Joseph Hicks, assignee of L. Peroni, for an improvement in thermometers. The invention of Peroni was patented in England, January 24th, 1878, and the original patent here, No. 222,420, was issued December 9th, 1879. It relates to the class of thermometers known as clinical thermometers, in which it is desirable that the bore should be as small as possible, in order that the column of mercury may respond rapidly to changes of temperature at the bulb. The employment of a bore almost microscopic in its calibre necessitates the use of a magnifying lens; otherwise, it is very difficult to detect the exact point in the bore at which the mercury stands. Peroni's improvement is di-

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rected to such a construction of the glass tube surrounding the bore for the mercury column as will increase the lens power of the tube.

The defences principally relied upon, besides that of non-infringement, are, (1) that the re-issue is void, being for that which was abandoned on the application for the original patent, and as enlarging the claim of the original; (2) anticipation by description in prior foreign publications; (3) prior public use.

The specification of the original patent follows *verbatim* that of the English patent. The invention is substantially described as consisting in locating the bore for the mercury in the glass tube beyond the mechanical centre or axis of the magnifying curve of the tube. This involves discarding the circular glass tubes commonly used, and employing those in which there is a convex surface so located as to be eccentric to the bore. Several illustrations are given to show how the bore is located when the magnifying surfaces of the tube differ in their form and location, and all of which exhibit how the scientific fact is utilized, that the apparent size of an object is magnified more when it is beyond the mechanical centre of the convex face through which it is viewed than when it is located at the centre of the arc formed by the convex face.

There were two claims in the original: "1. A thermometer tube having its bore out of or beyond the mechanical axis or centre, as and for the purposes described. 2. A thermometer tube having its bore out of and beyond the centre thereof, and a curved portion or portions for magnifying said bore, substantially as set forth." It is insisted, for the defendants, that these claims are intended to emphasize the theory, that the invention consisted of a tube in which the bore was to be outside the centre of the tube, and were intended to limit the patent to such an invention, and that this was done in order to obviate the danger that the claims would otherwise be anticipated by the Negretti and Zambra English patent, of 1852. Although the language of the claims, read without a careful

analysis of the specification, would seem to limit them to a tube in which the bore is out of or beyond the centre of the tube itself, the first claim is certainly capable of a construction as broad as the invention described in the specification; and, if the case were now here upon that claim, such would be the construction which it would receive. The mechanical axis or centre referred to in the claim would be construed to refer to the mechanical axis or centre of the convex or curved surface of the tube. There was nothing in the prior state of the art to require a more limited construction to the claim. The Negretti and Zambra patent merely describes a thermometer with a flat glass tube instead of a round one. It nowhere suggests the existence of any magnifying effect by reason of the change in the form of the tube or the location of the bore. So far as appears, Peroni was the first to suggest this. A reference to Peroni's English patent shows, that, in the claim, he specifically stated the nature of his invention to consist in making tubes in which the bore is out of or beyond the mechanical axis or centre of the magnifying curve. In the specification of his original patent here, he describes one form of tube which has a curved top and perpendicular sides, and another in which the curves are located between the top and the sides, which, he states, "by reason of the bore being beyond the mechanical centre or axis of such curves, act as magnifying curves or lenses, and thus magnify the appearance of the bore more than is the case where the bore is placed in the mechanical centre or axis of the tube or of the curved portion of the tube." Again, he represents a different section of tubing with his invention applied thereto, and states: "In this case the tube is mainly circular in section, and the bore is in the centre of the main portion thereof, but the tube is formed with a curved portion standing up above the general surface of the tube, and, by reason of the bore of the tube being beyond the mechanical axis or centre of such raised curved portion, the latter acts as a lens or magnifying curve, and greatly magnifies the appearance of the bore." All this is quite inconsistent with a construction of the first claim that

would limit the invention to one in which the bore is out of or beyond the mechanical axis or centre of the tube itself.

In the re-issue, the specification has been amended so as to express clearly what was plainly suggested, but left to be spelt out by inference, in the original. This has been done by a statement of the principle of his invention, and a more specific description of the means employed to carry it out. The first claim of the re-issue is: "A thermometer having its bore in rear of or beyond the mechanical axis or centre of the convex surface through which it is viewed, as and for the purpose described." The second is: "A thermometer having a convex or lens front for magnifying the bore, formed of a smaller curve than that of the body of the thermometer, substantially as set forth." The second claim, as also the third, (which is not involved in this suit,) cover details of construction described in the specification; but the first claim is broadly for the principle and means of producing the magnifying effect as described in the specification. While any uncertainty which existed in the first claim of the original patent is eliminated by the first claim of the re-issue, it is not a broader or a different claim, upon a fair and reasonable construction of that claim in the original.

What has already been said concerning the Negretti and Zambra patent disposes of any defence of anticipation resting upon that patent.

Reliance is also placed on a printed publication, which was a catalogue circulated by the complainant in 1876, in which he advertised thermometers for sale. One of these, designated as No. 450, is described as one "with an oval back and front." Another (No. 451) is described as one "with flat back, the front made in the form of a lens, so as to magnify the mercurial column." Neither of these descriptions suggests a tube in which the bore is so located as to be beyond the centre of the lens or curved surface through which it is to be viewed.

The defence of prior use is not satisfactorily established by the evidence. So far as it rests upon the thermometers of

Hicks sold in this country, those of the class described as No. 450 in his catalogue, and which were made with a flat back and front, so that they would not roll off a table when in use, if they magnified the column at all, they did so in a hardly appreciable degree, and they were of no practical utility in that behalf. The class described as No. 451 were passed upon by the Patent Office before granting the re-issue, and held not to show the invention of Peroni. Although they had been described in the complainant's catalogue as magnifying the mercurial column, the proofs show the bore to have been located between the lens surface and the centre of the arc of the lens, and, consequently, the magnification was much less than that produced by Peroni, and did not involve his principle.

As to the thermometers made and sold by Adolph Bayer, the evidence indicates, that, although he made half a dozen, or a less number, on one occasion, they were made experimentally, and the result was not sufficiently encouraging to induce him to repeat the experiment. He was a manufacturer and dealer in the article. The Peroni thermometer was a success as soon as it was introduced to the trade, while Bayer's fell still-born upon the current. The proof is not satisfactory that they were a practical success, but, on the contrary, indicates that they belong to the catalogue of abandoned experiments. The specimen exhibited was made years later, for the purpose of meeting a motion for an injunction, in a suit brought upon the complainant's patent.

Without considering with particularity the other instances of prior use relied upon, it suffices to say, that the defendants' case fails to meet and overthrow the presumption arising from the grant of the patent, by such cogent and satisfactory proof as the rule of law applicable to this defence requires.

The more difficult question in the case is as to infringement. The defendant is manufacturing extensively under the letters patent granted to Henry Weinhagen, October 19th, 1880, and re-issued January 16th, 1883. The claim of the original was for a thermometer tube having a flat bore and

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a flat back, and sides forming acute angles with said back, and converging toward and joining each other at an acute angle opposite the flat bore, so as to form a prismatic front. The theory of the invention is, that the magnifying power is due to the refracting action of the prismatic sides, in combination with the flattened bore in a plane at right angles to the line of view. Indeed, it is insisted by the experts for the defendants, that the substantial and practical magnifying effect found in the Peroni thermometer is not due to the lens action of the cylindrical tube, whether the bore of the tube be placed in its axis, or beyond that axis, or beyond the axis of curvature of any part of the tube, but is due to the refracting action of the sides; and an attack is made upon the complainant's patent as containing a false and deceptive specification in this regard. A careful consideration of the evidence, taken in connection with the experimental tests made upon the hearing, has led to the conclusion, that the theory of the defendants' experts is not correct. In his original specification, Weinhausen states that his tube "is made as sharp as possible at its junction, and forms a prismatic portion or front;" and that "the prismatic sides join each other at an acute angle opposite the bore." If the defendants' thermometer tubes were, in fact, of this description, they would not infringe the complainant's patent. The magnifying curve, which is the convex surface of Peroni, would be absent, and the two inventions would not involve the same principle. But, it is believed that Weinhausen found it necessary to adopt the principle of Peroni's invention. In his re-issue, the feature of the acute angle in front of the bore, formed by making the tube as sharp as possible at its junction, is modified by a description of the mode of making the tube, which results in the angles remaining "slightly rounded." This configuration of the angle appears quite clearly in the photographic representations of a section of his tubes. These present a "slightly rounded" angle or lens surface, which is substantially the same as is shown in figure 2 of the drawings of complainant's patent. The bore

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is located beyond the centre of the magnifying curve. It is, therefore, held that the defendants infringe.

A decree is ordered for the complainant.

Louis W. Frost, for the plaintiff.

Arthur V. Briesen, for the defendants.

WILLIAM J. FRYER, JR. vs. HENRY MAURER. IN EQUITY.

Re-issued letters patent No. 5,174, granted, December 3d, 1872, to Balthasar Kreischer, for an improvement in tiling used in fire-proof buildings under the floors, the original patent having been granted March 21st, 1871, do not cover any patentable invention.

The invention claimed is a hollow sectional tile combined with the girders of the building in such a manner that the tiling spans a space between opposite girders, the end sections being supported upon or against the girders, and the middle section forming a key to bind the sections together, the whole having a flat under surface.

Nothing adduced on the question of novelty shows an arch of hollow tiles, on which the several sections have plane joints, or are supported merely by the wedging power of the plane voussoirs; but, as an arch of hollow tiles made in sections, supported by girders on either side, between the stones of fire-proof buildings, was old; and such an arch, having a flat under surface, with the voussoirs interlocked by indented joints, and a keystone with an indented joint, was old; and the latter arrangement, with a recess in the end sections of the arch, receiving the flanges of the girders, with air spaces on the upper side of the arch, was old, nothing of Kreischer's structure being wanting but the plane joints of the arch; and a flat arch, with plane joints, and the intrados with no curve, was old; and a flat arch of hollow bricks, with the pieces against the joists having one side perpendicular and the other oblique, and the intermediate pieces having parallel sloping sides, and the key piece being of a wedge form, was old; there was no invention in what Kreischer did.

(Before WALLACE, J., Southern District of New York, March 19th, 1884.)

WALLACE, J. The invention described in the complainant's patent (re-issue No. 5,174, granted, December 3d, 1872,

to Balthasar Kreischer, original granted March 21st, 1871) relates to an improvement in tiling used in fire-proof buildings under the floors. The specification describes it as consisting in a hollow sectional tile combined with the girders of the building in such a manner that the tiling spans the space between opposite girders, the end sections being supported upon or against the girders, and the middle section forming a key to bind the sections together, the whole having a flat under surface. Considered with the aid of the drawings, the invention may be more intelligently understood as being an arch composed of sections of hollow tiles, and supported by girders against which it abuts at either side, the intrados having no curve, and the sections being voussoirs radiating to a centre, and the joints of the section being plane; and, as an incidental arrangement for supporting the arch, the end sections are provided with a recess, where they rest upon the flanges of girders, for receiving and interlocking with the flanges. The arch may be so formed on the upper side as to furnish air spaces for ventilation under the flooring, and it may also be provided with recesses in the sections at the joints on the upper side of the arch, into which the sleepers may be inserted; but neither of these features is essential, and neither enters into the claims, as one of their constituents.

The claims are as follows: "1. In combination with supporting beams or girders, a sectional hollow tile, whose end sections abut against opposite beams or girders, and whose middle section forms a key, and so constructed that the under side of the tile forms a flat surface, substantially as described. 2. A hollow tile made in sections, one of which forms a key for the end sections, which are provided with recesses to catch over the flanges of the girders, substantially as described."

The several publications relied on by the defendant as anticipating the patent are ineffectual for this purpose, because none of them describe an arch of hollow tiles, in which the several sections have plane joints, or are supported merely by the wedging power of the plane voussoirs. These publications,

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however, contribute important information concerning the prior state of the art, and materially assist the argument for the defendant, that there was no invention in what Kreischer did. In considering them, the drawings are of great assistance, as they illustrate clearly what the descriptive words alone would fail to point out adequately. These publications show, that it was not new to employ an arch of hollow tiles made in sections, supported by girders on either side, between the stories of fire-proof buildings. The French letters patent to Vincent Garcin, of October 11th, 1867, and amendment of October 9th, 1868, show such an arch, having a flat under surface or intrados. The voussoirs are, however, interlocked by indented joints, so that the sections support each other by this means. The keystone has also an indented joint. The French letters patent to Roux, Frères, of March 24th, 1868, show the same thing. They also show a recess in the end sections of the arch, where they rest upon the flanges of girders, for receiving the flanges, and air spaces for ventilation on the upper side of the arch. Every substantial feature of the complainant's patent is here shown except the plane joints of the arch, the sections in the Roux, Frères' patent having indented joints, but indented differently from Garcin's construction. Other publications show very similar arches, which are supported by rods or bolts instead of interlocking joints.

It is common knowledge, that the flat arch, in which the joints are plane and the intrados has no curve, is old. It was generally employed in doorways, fire-places, and windows. If Kreischer had been the first to introduce the plane joints of this arch into tiling for spanning the space between the girders of buildings, the case would resolve itself into the single question of fact, whether the substitution of the plane joints for the indented joints of Garcin and Roux, Frères, was such an obvious thing as not to involve invention. But, the English provisional specification of George Davis, of July 10th, 1868, for filling pieces for iron floors and ceilings, describes a filling of hollow bricks, in which the pieces which abut against the

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joists have one side perpendicular, and the other oblique, the intermediate pieces have parallel sloping sides, and the centre filling piece is of a tapering or wedge form, "so that, when the filling pieces are fitted together between the iron beams or joists, they form a self-sustaining flat arch, of which the centre-piece is the key." It thus appears, that Kreischer was not the first to employ the plane joints in an arch of tiling, for spanning the space between the girders of buildings. Such joints having been used for this purpose, it was not invention to employ them for the same purpose in the arches of Garcin or Roux, Frères. This was merely improving a known structure by introducing a known equivalent for one of its features.

The bill is dismissed.

George W. Van Sieten, for the plaintiff.

John A. Foster, for the defendant.

CHARLES W. S. BANKS

vs.

THE CHARLES P. HARRIS MANUFACTURING COMPANY.

An order, addressed to the defendant, read thus: "Messrs. C. P. Harris Mfg. Co. Order No. —. Send to C. W. S. Banks, of 59 South St., Baltimore, Md. Terms, net 30 days, freight allowed. M. D. Berry, Agent." Then followed a list of goods, with prices, and "to be shipped after two months from date of this order." The order was in duplicate. Banks signed it at the foot. Berry represented the defendant. He sent one order to the defendant, and left one with Banks, and himself kept a copy of the written parts. The defendant refused to send the goods. In a suit for their non-delivery: *Held*, that there was no sufficient memorandum in writing of a bar-

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gain of sale, to charge the defendant, within the statute of frauds, 29 Car. 2, c. 3, in force in Maryland, where the order was signed.

(Before WHEELER, J., Vermont, March 20th, 1884.)

WHEELER, J. One Berry, representing the defendant, a manufacturer of chairs, either as salesman or as a solicitor of orders, bargained to the plaintiff, a dealer in chairs at Baltimore, Maryland, two lots of unfinished chairs, at an agreed price, to be delivered there, amounting, respectively, to \$4,274 and \$2,458, and, by manifold writing, filled duplicates of blank orders for each, which were substantially alike, and, when filled, read: "Messrs. C. P. Harris Mfg. Co. Order No. ——. Send to C. W. S. Banks, of 59 South St., Baltimore, Md. Terms, net 30 days, freight allowed. M. D. Berry, Agent." Then followed a list of goods, with prices, and "to be shipped after two months from date of this order." They were signed at the foot by the plaintiff. One of each Berry left with the plaintiff, the other he sent to the defendant, and a copy of the written parts he kept himself. The defendant received the orders, refused to send the goods because the prices were so low, and the plaintiff brings this suit for the non-delivery.

A principal question is, whether this order is a sufficient memorandum in writing of the bargain, to charge the defendant, within the statute of frauds, 29 Car. 2, c. 3, still in force in Maryland. There is no real question but that these instruments sufficiently set forth the terms of the sale, if they show a sale, nor but that the name of the agent is sufficiently signed to the memorandum, if it is a memorandum of a bargain of sale, and he had authority to bind the defendant to a contract of sale. (*Drury v. Young*, 58 Md., 546.) The memorandum must set forth on its face enough to gather a contract of sale from, as against the party to be charged with the consequences of such a contract, in the action. (*Egerton v. Mathews*, 6 East, 307; *Cooper v. Smith*, 15 East, 103; *Bailey v. Ogdens*, 3 Johns., 399.) This memorandum appears to be of an order, and not of a sale; and would, so far as it shows for itself, fail

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to make out a sale, without acceptance of the order. (*Chitty on Con.*, 349.) The acceptance of the order might be by a delivery or forwarding of the goods according to its terms, so as to charge the purchaser with the price, without acceptance by him; but here there is no delivery; the action is for want of that. There is nothing from the defendant to help this memorandum out at all. There was a letter to the plaintiff, after the order was received, but it treated the memorandum as an order, and did not in any way recognize a sale. (*Cooper v. Smith, supra.*) In *Drury v. Young*, the memorandum was, "Sold W. H. H. Young," &c. No case has been shown or observed in which the writing did not show a sale, or that from which a sale could be gathered, where it is held sufficient. In this instrument, the name of the defendant itself appears, put there by its agent, but as being requested to send the goods, not as selling them. The name of the agent appears, but only as to ordering the goods. If he joined as agent in the order, it would be as agent of the plaintiff, for that comes from him to the defendant, and does not proceed at all from the defendant. If he was authorized, he could accept the order in writing, and then the whole would show a bargain of sale. But, the acceptance is lacking, and the memorandum is of only one side of a bargain. The agent has testified to the bargain, and that the writing delivered to the plaintiff was intended to show it. This would be well enough if the writing did show it. Parol evidence is admissible to show the meaning of trade expressions, and to apply the writing to the circumstances, but not to contradict the writing, nor to supply any part required by the statute to be in writing. To hold that what is on its face an order may be shown to be intended as a sale, or that an acceptance of an order necessary to make a sale may be supplied by parol, would be to disregard the plain provisions of the statute. In any view of Berry's authority, the statute cuts off this action.

Judgment for defendant.

Aldace F. Walker, for the plaintiff.

Walter C. Dunton and *Eleazer R. Hard*, for the defendant.

HORACE BARLOW

vs.

HENRY LOOMIS AND OTHERS. IN EQUITY.

B., in his lifetime, delivered and transferred to L. bonds, under written agreements between them; one, that L. should hold the bonds in trust to pay the interest to B. during his life, and, at his death, to transfer them to persons named; the other, that L. should hold the bonds for the benefit of persons named, at the death of B., reserving to him the right to demand and have the income while he should live, and to revoke the trust and have the bonds returned to him, if he should so elect. L. paid the interest to B. during his life. B. did not revoke the trust, but died leaving the bonds in the possession of L.: *Held*, that the bonds were no part of the estate left by B. at his death.

(Before WHEELER, J., Vermont, March 20th, 1884.)

WHEELER, J. The orator is a residuary legatee under the will of Sidney Barlow, who, in his life, at three several times, delivered and transferred to the defendant Loomis stocks and bonds, under written agreements made between them, providing, in two of them, that Loomis should hold the stocks and bonds in trust to pay over the interest and dividends to Barlow during his life, and at his decease to transfer them to the other defendants; and, in the other, that Loomis should hold the bonds for the benefit of other defendants at the death of Barlow, reserving the right to him to demand and have the income while he should live, and to revoke the trust altogether and have the bonds returned to him, if he should so elect. Loomis paid the income to Barlow during his life. Barlow did not revoke the trust, but died leaving the stocks and bonds in the possession of Loomis. This bill is brought to have these stocks and bonds brought into the assets of the estate, so that the orator may have his share of them. The orator's interest in them depends wholly upon whether they were a

Barlow v. Loomis.

part of the estate of the testator at the time of his death. If they were, his share in them goes to him by the will; if they were not, nothing of them would pass by the will, to him or any one. There is no question as to mental capacity, nor as to the rights of creditors, nor in any way as to the right and power of the testator to give or dispose of these securities to Loomis or the beneficiaries, or any one else, in any manner he might see fit. The sole inquiry is as to the effect of what he did do. He could control the disposition of his estate after his death only by will executed according to the statute of wills; but he could divest himself of this property during life, by mere delivery and transfer, such as he fully accomplished. Had there been no reservations there could have been no question. But these reservations were all optional and personal to himself. If he did not exercise his right to them they were gone; he died without exercising the right, and it expired with him, leaving the property absolutely gone out of his estate, and wholly beyond the orator's rights. The transaction was in Vermont, governed by Vermont laws, which fully uphold it, in this view. (*Blanchard v. Sheldon*, 43 Vt., 412.) Upon the case made, there is no relief to which the orator is entitled.

Let there be a decree dismissing the bill, with costs.

E. R. Hard and *A. G. Safford*, for the plaintiff.

Daniel Roberts and *Robert Roberts*, for the defendants.

The Western Union Telegraph Company v. The National Telegraph Company.

THE WESTERN UNION TELEGRAPH COMPANY

vs.

THE NATIONAL TELEGRAPH COMPANY, THE BALTIMORE AND OHIO TELEGRAPH COMPANY, AND THE NEW YORK, WEST SHORE AND BUFFALO RAILWAY COMPANY. IN EQUITY.

An agreement whereby a railroad company, "so far as it legally may," grants to a telegraph company an exclusive right of way along its line, and agrees not to furnish any competing line any facilities which "it may lawfully withhold," will be interpreted as granting only such an easement as is necessary for the legitimate use of the telegraph company in constructing and operating its lines, because otherwise it would contravene the Act of Congress, of July 24th, 1866, (14 *U. S. Stat. at Large*, 221.)

The telegraph company will be protected, by injunction against the railroad company, in the possession of a line of telegraph which it has constructed.

An injunction to restrain a proposed breach of a contract was refused.

(Before WALLACE, J., Southern District of New York, March 28th, 1884.)

WALLACE, J. The complainant moves for a preliminary injunction to restrain the two telegraph companies, defendants, from erecting and operating the telegraph line upon the land of the defendant railway company, and to enjoin the railway company from permitting either of the defendant telegraph companies to use its right of way for such purpose, and from violating any of the provisions of an agreement entered into between the complainants and the Jersey City and Albany Railway Company, on the 7th of January, 1880. The facts are these: On the 7th of January, 1880, the complainant entered into a written agreement with the Jersey City and Albany Railway Company, which, among other things, contained the following clause: "The railway company, so far as it legally may, hereby grants, and agrees to assure, to the telegraph company, an exclusive right of way on and along the line and lands of the railway company, and on any extension

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or branches thereof, for the construction and use of lines of poles and wires for commercial or public uses or business, with the right to put up, from time to time, such additional wires or lines of poles and wires as the telegraph company may deem expedient; and the said railway further agrees * * * * that it will not furnish any competing line any facilities or assistance that it may lawfully withhold."

At the time this agreement was entered into, the Jersey City and Albany Railway Company was constructing a line of railroad from a point on or near the Hudson River, in the county of Hudson, in the State of New Jersey, through the State of New Jersey, and thence northerly to a point at or near Fort Montgomery, on the Hudson river, those points being the termini of its route, as provided in its articles of association. It appears, by the affidavits, that the complainant constructed a telegraph line, of about 26 miles in length, along the right of way of the railway company, between Richfield Junction, N. J., and Haverstraw, N. Y., which was carried into and connected with the several stations of the railway, which line was operated by the complainant under its contract with the Jersey City and Albany Railway Company. In March, 1880, the North River Railway Company was incorporated and organized, and, in May, 1880, the Jersey City and Albany Railway Company consolidated with this corporation. In February, 1880, the defendant the New York, West Shore and Buffalo Railway Company was incorporated and organized, and, in June following, consolidated with the North River Railway Company, and, by the agreement of consolidation, succeeded to and assumed all the obligations of the Jersey City and Albany Railway Company to the complainant.

The bill alleges, that the defendant railway company is now seeking to disaffirm and violate the obligations of the contract of January 7th, 1880, and is allowing and assisting the defendant telegraph companies to construct and operate over its right of way a line of telegraph, to be operated in competition with any line which may be constructed by the

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complainant; and that the defendant telegraph companies are proceeding to construct and erect their competing line upon the lands of the railway company, without the consent of the complainant, and without acquiring any right of way by condemnation, and compensation to the complainant therefor.

It is claimed, on the part of the complainant, that, along certain portions of the lands of the railway company, owing to the physical characteristics of the route, there is not sufficient room for more telegraph lines than are or may be necessary for the convenient operations of the complainant's business. The proofs do not sustain this contention.

Without considering the question whether the railway of the New York, West Shore and Buffalo Company is an extension of the Jersey City and Albany Railway Company, the case may be disposed of upon other grounds. If it was the purpose of the agreement to enable the complainant to exclude all other telegraph companies from acquiring a right of way for constructing and operating their lines over the lands of the railway company, the agreement was void as against public policy, and in contravention of the Act of Congress of July 24th, 1866, (14 *U. S. Stat. at Large*, 221.) That Act authorized any telegraph company then organized, or thereafter to be organized, under the laws of any State of the Union, to construct, maintain, and operate lines of telegraph over and along any post road of the United States. The railroad here and all railroads in the United States are such post roads; the Act of Congress applies to them; and its provisions are operative and supreme, as a legitimate regulation of commercial intercourse among the States. This was decided by the Supreme Court, in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, (96 *U. S.*, 1.) It was not held in that case that a telegraph company could acquire a right of way over a railroad without the consent of the owner of the said road, or even that the Act gave to telegraph companies the power to acquire such a right of way by compulsory proceedings, upon due compensation to the owner; and the contrary

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was plainly intimated. But, the Act was considered and expounded as intended and effectual to deny to any one telegraph company the power to acquire any such easement in the lands of a railroad, for telegraphic facilities, as would exclude other companies from obtaining like privileges, and as a declaration by Congress, of a policy, in the interests of the public and of the Government, which was reasonable and lawful. Since that decision it has been adjudged in two cases, in the Circuit Courts of the United States, that a railroad company cannot grant to a telegraph company the exclusive right to establish a line over its right of way. (*Western Union Telegraph Co. v. American Union Telegraph Co.*, 9 Bissell, 72; *Western Union Telegraph Co. v. Burlington & Southwestern Railway Co.*, 11 Fed. Rep., 1.) See, also, *Western Union Telegraph Co. v. American Union Telegraph Co.*, (65 Georgia, 160.) Whether an agreement of this kind would not be void, as intended to strangle competition, and, therefore, as being in restraint of trade and obnoxious to public policy, irrespective of the Act of Congress, is a question which it is not necessary to discuss. It suffices, that such an agreement is void because contrary to the policy declared by Congress.

The agreement here is to be interpreted so as, if possible, to give it some efficacy and validity. Its language is carefully chosen, so as to permit it to be thus interpreted. The railway company assumes to grant only "so far as it legally may." Were it not for this qualification, the grant would be void. The complainant can take nothing by the agreement beyond such an easement as is necessary for its legitimate use in constructing and operating its lines. To this extent it could acquire an exclusive right. It could not acquire the right to dictate to other telegraph companies upon what terms they may be permitted to construct and operate competing lines. Nor could the railway company put it out of its own power to permit any telegraph company to enjoy the privileges given by the Act of Congress, by a cession of that power to the complainant. This would be as obnoxious to the spirit

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and meaning of the law as a grant excluding other telegraph companies from the lands of the railway. It would be doing indirectly what cannot be done directly. It would lodge the power with a favored company, to impose such onerous terms upon other companies as to preclude competition.

If it were not practicable for the defendant telegraph companies to construct their lines upon the lands of the railroad without invading the complainant's easement, by using its poles or otherwise, they would be obliged to obtain the consent of the complainant, or resort to such proceedings as are authorized by the laws of the State, under the power of eminent domain. Such is not the case exhibited by the record, and the railway company consents. As to these defendants, therefore, the motion for an injunction is denied.

The complainant alleges that the railway company has removed some of the old line of poles and wires erected by the complainant between Richfield Junction and Haverstraw, with the intention of preventing the complainant from operating its line. This is denied by the railway company. Sufficient appears, however, to indicate that the railway company is hostile to the complainant, and in sympathy with the defendant telegraph companies, and, in view of all the circumstances, it is deemed reasonable that the complainant be protected, during the pendency of the suit, in its possession of the line it has actually constructed. To this extent an injunction will be granted as against the railway company.

The agreement between the complainant and the predecessor of the present railway company contains various stipulations for the benefit of the complainant, which the complainant insists the railway company proposes to violate, and should be enjoined from violating. One of these stipulations is, that the railway company shall furnish office room, light and fuel, free of charge, to the complainant, whenever the complainant elects to establish an office at a station of the railway company. As to all these stipulations it is sufficient to say, that the com-

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plainant has an adequate remedy at law, for any breach that may take place. Although equity interferes by injunction to restrain the breach of an agreement, when the case is one in which a decree for a specific performance might be made, as, also, in some cases, to restrain the breach of negative covenants, the ground of the jurisdiction is, that compensation in damages will not afford redress to the complaining party. This is not such a case.

Wager Swayne and *Burton N. Harrison*, for the plaintiff.

Edward R. Bacon and *Grosvenor P. Lowrey*, for the defendant telegraph companies.

M. M. Waters, for the defendant railway company.

JAMES S. SIMPSON AND GEORGE F. SIMPSON

vs.

WILLIAM H. DAVIS. IN EQUITY.

The cost, to the defendant, of making a newel-post infringing the plaintiff's patent for a design, was \$5. It was sold for \$7. Allowing 10 *per cent.* for a manufacturer's profit, the profit was \$1 50. The defendant was, at the same time, selling newel-posts, of other designs, not patented, from which he realized as much as from sales of those containing the plaintiff's design: *Held*, that that fact did not dispel the presumption that the \$1 50 was profit from adopting the plaintiff's design.

Under § 4,919 of the Revised Statutes, when the defendant's profits do not amount to as much as the plaintiff's damages, the Court may, in a suit in equity, add to the amount of such profits a sum sufficient to make the amount decreed equal to the plaintiff's damages.

(Before BENEDICT, J., Eastern District of New York, April 2d, 1884.)

BENEDICT, J. This case comes before the Court upon the master's report of the complainants' damages and the defendant's profits arising out of an infringement by the defendant of the plaintiffs' patent for a design for newel-posts.

The proof is that 101 newel-posts made and sold by the defendant embodied the design secured to the plaintiffs by their patent. The cost of making these posts is shown, by a stipulation made between the parties, to be \$5 each. The testimony shows that 10 *per cent.* is the fair manufacturer's profit on the construction of such an article. The defendant sold the newels so made by him for \$7 each. His profit, therefore, for the use of complainants' design, is \$151 50. It is contended, by the defendant, that the proofs show that, at the time he was selling newels of the plaintiffs' design, he was also selling newels of other designs, not patented, from which sales he realized as much as he did from the sales of the plaintiffs' newels; and, therefore, it is said no profit accrued to the defendant from the use of the plaintiffs' design. But, the remainder of the price realized from the sale of newels of the plaintiffs' design, after deducting the cost of making the newels, and a fair profit for their manufacture, must be presumed to represent the profit realized by the defendant from his adoption of the plaintiffs' design, in the construction of the newels sold by him. And this presumption is not dispelled by proving that the defendant realized the same profit from adopting, in the manufacture of the newels sold by him, a different and unpatented design. The fact that a certain profit is realized from the adoption of the design of A. does not show that no profit is realized from the adoption of the design of B.

The 4th exception raises the question whether the plaintiff can, by virtue of § 4,919 of the Revised Statutes, recover damages resulting from the defendant's infringement of his patent, in addition to the profits realized by the defendant. Doubts appear to have existed in regard to the meaning of the provision in § 4,919, but I understand the Supreme Court, in *Birdsall v. Coolidge*, (93 U. S., 64,) to hold the effect of the statute to be, that, when it appears, in a case in equity, that

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the defendant's profits, derived from the use of the plaintiff's invention, do not amount to so much as the plaintiff's damages arising from the infringement, the Court may add to the amount of the defendant's profits a sum sufficient to make the amount awarded by the decree equal to the plaintiff's damages. So the decision referred to is understood in *Child v. Boston & Fair Haven Iron Works*, (19 Fed. Rep., 258.) Under this construction of the statute, the plaintiffs, upon the proofs in this case, may have added to the defendant's profits the sum of \$151 50, making the recovery \$303, which is the amount of the plaintiffs' damages, as shown by the proofs.

Edwin H. Brown and Arthur Murphy, for the plaintiffs.

N. H. Clement and Sidney V. Lowell, for the defendant.

 ROBERT H. MOORE AND OTHERS

vs.

THE NORTH RIVER CONSTRUCTION COMPANY, THE NEW YORK,
WEST SHORE AND BUFFALO RAILWAY COMPANY AND THE
UNITED STATES TRUST COMPANY. IN EQUITY.

A citizen of New York brought a suit, in a State Court, against a corporation of New Jersey and two corporations of New York, claiming to be a creditor, without judgment, of the New Jersey corporation. The complaint prayed that certain real estate alleged to have been paid for by that corporation, when insolvent, and conveyed directly to one of the other corporations, in fraud of the plaintiff's rights, be sold to satisfy his claims, and that the defendants be restrained from disposing of or incumbering the land. No judgment was asked for against the New Jersey corporation: *Held*, that this Court could not entertain jurisdiction of the case, by a removal of the suit by the New Jersey corporation, under clause 2 of section 2 of the Act of March 3d,

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1875, (18 U. S. Stat. at Large, 470,) because there was no separate and distinct controversy, which could be fully determined, between the plaintiff and the New Jersey corporation.

(Before COXE, J., Southern District of New York, April 8d, 1884.)

COXE, J. The plaintiffs are citizens of New York. The defendant the North River Construction Company is a New Jersey corporation. The other two defendants are New York corporations. The plaintiffs are creditors of the Construction Company. There being no pleading before the Court but the complaint, it must be the sole guide in determining the character of the action. The relief demanded is, that certain real estate alleged to have been paid for by the Construction Company, when insolvent, and conveyed directly to the railway company, in fraud of the plaintiffs' rights, be sold to satisfy their claims; also, that an injunction issue, restraining the defendants from disposing of or incumbering the land. No judgment is asked for against the Construction Company.

It is argued, that, because the plaintiffs are not judgment-creditors, there is a controversy between them and the Construction Company, and that this Court, therefore, has jurisdiction. In one sense, undoubtedly, this is true; but, is it such a controversy as is contemplated by the statute? Is it, to use the language of the Chief Justice, in *Hyde v. Ruble*, (104 U. S., 409,) "a separate and distinct cause of action?" Does the complaint state two causes of action or one? No separate judgment could be entered against the Construction Company. Should the trial Court find, on the main issue, that there were no purchases of land, as alleged, the complaint would be dismissed as to all of the defendants, without reference to what the proof might be upon the question of indebtedness. Test it in another way. Suppose, on the trial, the plaintiffs prove that they are creditors of the Construction Company, and there stop. Would there be a judgment against that company for the amount so proved, or a general decree in favor of all the defendants? It is thought that, under the

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allegations of this complaint, the latter would be the inevitable result. In *Barney v. Latham*, (103 U. S., 205,) on the contrary, there were two entirely distinct controversies, in each of which judgment could be entered.

In the case at bar, the perplexities which surround the question of jurisdiction are enhanced by reason of the anomalous character of the action; but, it may be said, with certainty, that the goal which the plaintiffs seek is the land in the possession of the West Shore Company. In order to reach it, they must establish a number of facts, regarding which, undoubtedly, a controversy may arise between them and the Construction Company. For instance, they must prove that the company was insolvent, that its money paid for the land, that the transfer was collusively made, that they are its creditors, etc. The Construction Company is interested in disproving each of these propositions; but, are they not, if denied, issues to be tried, rather than separate and distinct causes of action? I am constrained to hold that the motion should prevail, on the ground that the action, if it can be maintained at all, must proceed upon the theory that there is no separate and distinct controversy which can be fully determined between the plaintiffs and the Construction Company, within the meaning of the second clause of the second section of the Act of March 3d, 1875, (18 U. S. Stat. at Large, 470.)

The complaint has been considered solely with reference to the question of jurisdiction. It is not intended that anything said upon this question shall be considered as an intimation that a creditor who has not established his claim by a judgment can maintain an action of this character.

The motion to remand is granted.

Edward W. Paige and *Alonzo P. Strong*, for the plaintiffs.

P. B. McLennan, *Otto T. Bannard*, and *Albert B. Boardman*, for the defendants.

CLINTON G. COLGATE

vs.

THE WESTERN UNION TELEGRAPH COMPANY. IN EQUITY.

In a suit in equity for the infringement of a patent, there was an interlocutory decree for the plaintiff, and an injunction, a settlement, a license, and payment for a release. Afterwards the defendant applied for a rehearing, on the ground of newly discovered evidence. The application was denied, on the ground of laches.

(Before WALLACE, J., Southern District of New York, April 4th, 1884.)

WALLACE, J. This is an application by the defendant for a rehearing in a cause decided in November, 1878, (15 *Blatchf. C. C. R.*, 365,) and in which an interlocutory decree was entered in December 1878, adjudging the validity of the complainant's letters patent and the infringement thereof by the defendant, and that the complainant recover the profits of the defendant derived by such infringement. In January, 1879, the complainant applied for a final injunction against the defendant, to enjoin the infringement, which was granted as to any further use of the invention, but, as to certain uses to which it had already been applied, the question of issuing a perpetual injunction was postponed, to await an accounting and application for a final decree. Thereafter, the parties entered into negotiations, which resulted in the defendant's taking a license from the complainant, and paying \$100,000 for a release.

The application is made on the ground of newly discovered evidence, which shows the withdrawal of an application for a patent. At the hearing of the cause, the defence of abandonment of the invention was relied on by the defendant, and was considered in the opinion delivered by the Court, and overruled in part upon the view that the application for a

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patent had never been withdrawn by the inventor. Upon that hearing, it was stated by counsel for the complainant, that a letter had shortly before been found by him, in looking over the files of the Patent Office, written by the inventor, formally withdrawing the application; and this fact was fully brought to the attention of the defendant's counsel. Whether it was assumed by the defendant's counsel that the fact was not of sufficient importance to be incorporated into the proofs, or whether they supposed it would be treated by the Court as a conceded fact, is not material, in view of the decision and opinion of the Court, by which it was plainly indicated that the fact was a material one, and was not in the proofs.

If, under these circumstances, an application had been promptly made for leave to reopen the proofs, and for a rehearing, it would have been incumbent upon the defendant to satisfy the Court that the evidence could not have been obtained by the exercise of reasonable diligence, and introduced before the hearing. (*Baker v. Whiting*, 1 Story, 218; *Jenkins v. Eldredge*, 3 Story, 299.) It is not necessary to search for authorities outside the decisions of this Court, maintaining the rule, that a rehearing will be denied if the non-production of the evidence is attributable to the laches of the party or his counsel. (*India Rubber Comb Co. v. Phelps*, 8 Blatchf. C. C. R., 85; *Hitchcock v. Tremaine*, 9 Id., 550; *Ruggles v. Eddy*, 11 Id., 524, 529; *Page v. Holmes Burglar Alarm Co.*, 18 Id., 118.) Whatever might have been the result of an application, if it had then been made, it would have appealed much more forcibly to the judicial discretion than can be expected now, after more than three years have elapsed, after further hearing has been had, and a perpetual injunction ordered against the defendant, and after the defendant has recognized the complainant's rights by compromising for past use, and taken a license for the future use of the invention, and for a considerable period has been enjoying the use of the invention under the license. The law of laches, as applied to motions for new trials or rehearings, is founded on a salutary policy. It is for the interest of the public, as well as of litigants,

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that there should be an end to litigation, and that efforts to reopen] controversies by unsuccessful parties, after they have had a full opportunity to be heard, and a careful hearing and consideration, should be discouraged.

A rehearing is denied.

Frederic H. Betts, for the plaintiff.

Wager Swayne, for the defendant.

RAFAEL PENTLARGE

vs.

FREDERICK PENTLARGE AND WILLIAM R. BEESTON. IN
EQUITY.

In a suit in equity brought under § 4,918 of the Revised Statutes, to determine a question of interference between two patents, where the defendant sets up, by plea, that the plaintiff's patent is void for want of novelty, and the plea is overruled on the ground that, in a proceeding under § 4,918, the plaintiff's patent cannot be attacked for want of novelty, the defendant will not be allowed to set up afterwards, in an answer, the matter contained in the plea.

(Before BENEDICT, J., Eastern District of New York, April 7th, 1884.)

BENEDICT, J. This is an application made by the defendants for permission to set up in their answer to a supplemental bill, matter heretofore set forth, by way of defence, in a plea to the original bill, which plea has been, upon argument, overruled upon the merits. (*Ante*, p. 10.) The action is instituted by virtue of § 4,918 of the Revised Statutes, to procure a determination of the question of interference between a patent owned by the plaintiff and a patent owned by the defendants. In defence, a plea was interposed, wherein was set up an Eng-

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lish patent prior in date to the plaintiff's patent, and, as it is claimed, for the same invention, which patent, if found to be as claimed by the defendants, would show the plaintiff's patent to be void for want of novelty. This plea, having been set down for argument, was overruled, upon the ground that, in the proceeding authorized by § 4,918, it is not permissible for a defendant to attack the plaintiff's patent for want of novelty in the invention. Thereafter, the plaintiff, by leave of the Court, filed a supplemental bill, in which he sets up, and, by virtue of § 4,918, prays relief against, a patent re-issued to the defendants since the commencement of this suit, upon a surrender of the defendants' patent described in the original bill, and in place thereof. Now the defendants apply for permission to set up, in their answer to the supplemental bill, the same matter set up by them in their plea to the original bill.

The defendants insist, that, by virtue of Equity Rule 39, they, as matter of right, must be granted the permission sought. I do not understand Equity Rule 39 to confer upon a defendant an absolute right to set up, in his answer, matter which, upon his plea, has been held to be no defence to the action. The defendants, doubtless, had the right to elect whether to set up the matter in question by plea or by answer; but, having elected to set it up by plea, when this matter was determined, upon the argument of this plea, to be insufficient as a defence, that question became *res adjudicata* in this case; and Rule 39 confers upon a defendant no right, by setting up the same matter in his answer, to compel the Court to adjudicate the same question a second time. So it was said in *Hubbell v. De Land*, (14 *Fed. Rep.*, 471,) and, notwithstanding what was said in *Sharp v. Reissner*, (20 *Blatchf. C. C. R.*, 10,) that case is not an authority to the contrary.

The defendants also claim permission to set up this matter a second time in an answer, by virtue of the practice of Courts of Equity outside of the Equity Rules. But, the cases cited furnish no authority for saying that the ordinary practice of Courts of Equity entitles the defendants to the relief here

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moved for. When a plea states matter which may be a defence to the bill, though, perhaps, not proper for a plea, or informally pleaded, it is usual to allow the plea to stand as an answer, (*Mitford's Pl.*, 303 ;) and, in such a case, permission may be given to insert such matter in the answer, where the plea has, upon argument, been overruled. But, when a plea has been overruled, upon argument, because the matter of the plea constitutes no defence to the action, the defendant, if he answers, must make a new defence. Here, the application is to be allowed to insert in an answer matter which has already, in this case, upon the defendants' own plea, been adjudged not to constitute a defence. I have not been able to find any authority supporting such an application, and I know of no reason why it should be granted.

Preston Stevenson, for the plaintiff.

Brodhead, King & Voorhies, for the defendants.

JAMES J. HICKS

vs.

FERDINAND G. OTTO AND OTHERS. IN EQUITY.

After a final hearing on pleadings and proofs, and a decision in favor of the plaintiff, in a suit in equity for the infringement of a patent, the defendant applied for leave to amend the answer and for a rehearing, in order to set up a new defence of prior use. It did not appear that the facts constituting the new defence could not have been discovered, by reasonable diligence, before the hearing. The facts showing diligence were not specified, but the conclusion only was alleged. The application was denied.

(Before WALLACE, J., Southern District of New York, April 9th, 1884.)

WALLACE, J. The application to amend the answer, and for a rehearing, (*ante*, p. 94,) should be denied, because it does not satisfactorily appear that the facts constituting the new defence could not have been discovered, by the exercise of reasonable diligence, before the cause went to a hearing. The complainant has conducted a difficult, protracted, and expensive litigation to a successful issue, and it would subject him to great hardship to compel him now to abandon the fruits and meet a new defence. It was his right to be apprised, by the answer, of the defences which he would have to meet and overthrow, so that he could elect whether to proceed with his suit or abandon it.

Amendments of pleadings, which introduce a new defence, are permitted with great reluctance, in equity, after a cause has been set for hearing, and, after a hearing, are rarely allowed. (*Walden v. Bodley*, 14 *Peters*, 156, 160; *Smith v. Babcock*, 3 *Sumner*, 583.) When the application is based upon the ground of newly discovered evidence, a more liberal rule obtains, but Courts of equity, as well as Courts of law, in such cases, proceed with great caution, and extend no indulgence to the negligent. Unless it appears affirmatively that the evidence could not have been obtained in due season, if the party applying had used all reasonable efforts in that behalf, the application will be denied. It is due to the public interests, as well as to the immediate litigants, that rehearings for the purpose of letting in evidence which might and ought to have been introduced before the hearing should not be tolerated. In no class of cases should the practice of allowing rehearings be more strictly guarded than in cases like the present, where the defence of prior use is relied on to defeat the novelty of a patented invention; because, it is seldom that a defendant cannot make it appear that he has discovered additional evidence in support of such a defence.

The defendant states, in his affidavit, in general terms, that "he has been eager to collect all material evidence," and "has made great exertion, and every reasonable effort, to defend the suit." These are his conclusions, but, if the facts

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were specified, they might not be the conclusions of the Court. Such generality of statement is not sufficient. If it could not be conscientiously made in almost every case, it could be, in every case, with facility and with entire safety.

The motion is denied.

Arthur V. Briesen, for the plaintiff.

Louis W. Frost, for the defendants.

THE RHEOLA.

C., a laborer, employed by a master stevedore, was unloading iron ore from a steamer, at a wharf, by filling it, in the hold, into tubs, which were hoisted by a chain, furnished by the steamer. The chain broke and the tub fell upon him, and injured him: *Held*,

- (1.) It was the duty of the master of the steamer to provide a suitable chain, and, if he was negligent in that respect, the ship-owner and the vessel were liable;
- (2.) Negligence in the master was shown, as a fact;
- (3.) C. was not negligent or in fault;
- (4.) The sum of \$750 should be awarded to him, as compensation.

(Before WALLACE, J., Southern District of New York, April 12th, 1884.)

WALLACE, J. The libellant has appealed from a decree of the District Court for the Southern District of New York dismissing the libel. (7 *Fed. Rep.*, 781.) The suit is *in rem*, and is brought to recover for personal injuries sustained by the libellant, while unloading the Rheola, in July, 1879, when she was discharging cargo alongside a pier in the port of New York. The libellant was one of a number of laborers employed by one Hogan, a master stevedore, to discharge the cargo, which consisted of tin in cases and iron ore in bulk.

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He and others, in all a gang of six men, were in the lower hold of the ship, filling the hoisting tubs with the iron ore. He had hooked one of the tubs to the chain, and was in the act of filling another, when the chain broke, while the tub was suspended over the hatchway, and the tub fell upon him. Three tubs were being used, and the work was done rapidly. The chain and hoisting apparatus were furnished by the steamer, under the bargain with the stevedore.

It is not suggested that the suit is not properly brought *in rem*, if the master, while acting within the scope of the authority conferred upon him by the owners, in the management of the vessel, was guilty of negligence towards the libellant. Negligence, when committed upon navigable waters, is a maritime tort, which subjects the vessel to liability to an extent coincident with the liability of the owner. (*The Germania*, 9 *Benedict*, 356; *The Commissioners v. Lucas*, 93 *U. S.*, 108.) If the relations of the master of the steamer towards the libellant were such as to create a duty not to be negligent, the latter is entitled to recover, if there was a breach of that duty. (*Leathers v. Blessing*, 105 *U. S.*, 626.)

The learned Judge in the Court below was of the opinion, that, as there was no privity of contract between the libellant and the owners of the steamer, they were not liable, unless the thing by which he was injured was imminently dangerous; but he was also of opinion, that, if the degree of negligence which would make an employer liable to his employee were enough, such negligence was not established by the proofs.

As the libellant was not directly employed by the master, and could only look to the master stevedore for his pay, there was no privity of contract between him and the ship-owners. Nor did the relation of master and servant, in its technical sense, exist between the libellant and the ship-owners. But, it is conceived that this does not in the least affect the obligation of the master not to be negligent towards the libellant, or the degree of care which it was incumbent upon him to exercise. The libellant was performing a service in which the ship-owners had an interest, and which they contemplated would be

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performed by the use of appliances which they had agreed to provide. They were under the same obligation to him not to expose him to unnecessary danger that they were under to the master stevedore, his employer. There was no express contract obligation, on their part, to either, to provide safe and suitable appliances; but they were under an implied duty to each; and the measure of the duty towards each was the same. What would be negligence towards one would be towards the other. (*Coughtry v. Globe Co.*, 56 *N. Y.*, 124; *Mulchey v. Methodist Society*, 125 *Mass.*, 487.)

The implied obligation on the part of one who is to provide machinery or means by which a given service is to be performed by another, is to use proper care and diligence to see that such instrumentalities are safe and suitable for the purpose. "It is the duty of an employer inviting employees to use his structure and machinery, to use proper care and diligence to make such structure and machinery fit for use." (*Wharton on Negligence*, § 211.) If he knows, or, by the use of due care, might have known, that they were insufficient, he fails in his duty. This doctrine is cited with approval in *Hough v. Railway Co.*, (100 *U. S.*, 220.) Due care, or ordinary care, implies the use of such vigilance as is proportioned to the danger to be avoided, judged by the standard of common prudence and experience. Applying this test here, where, if the appliances to be used were defective, serious casualties were to be apprehended, it was the duty of the master of the steamer to exercise a corresponding vigilance to provide against them.

The proofs show, that the average weight of the tubs of ore which were being hoisted out of the hold was about 1,800 pounds; that, on the day before, one of the chains of the steamer, which was being used in the same work, broke; that both of these chains had been in use about two years; that the one that broke first had been used more than the other; and that such chains, when in proper condition, were sufficiently strong to sustain a hoisting weight of six or seven tons. Concededly, the chain was defective, as it broke with

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a weight of 1,800 pounds, after it had only been used to hoist four or five tubs. It was rusted and considerably worn in appearance. The breaking of the other chain was a circumstance to attract attention and put the master on inquiry. Under these circumstances, it must be held, that the casual examination of the chain, which was given to it while it was being brought from the other hatch, was not sufficient to exonerate the master from the charge of negligence. Before he permitted it to be employed in a use which was so hazardous to those who were to use it, he should have made a careful and thorough test or examination. Anything less than this was a failure to observe proper care.

The proofs do not justify the inference that the libellant was negligent. If he had had any reason to anticipate the accident, he could, undoubtedly, have escaped ; but this may be said in almost every conceivable case where an accident has happened. It was not indispensable for him to remain exposed while actually filling the tubs ; but, part of the time, he and the other laborers were necessarily there, because they had to unhook the empty tubs, hook on the full ones, and steady them until they were hauled out of the hold. The work was being done with great despatch ; there were six men doing it, and a limited place in which to do it ; the tubs, while being filled, stood near the hatchway, and, part of the time under it ; and, under all the circumstances, it would seem that the libellant was as careful as, in the hurry and excitement of the occasion, could be reasonably expected of him, and should not be deemed in fault.

The proofs show, that, while the libellant sustained painful injuries, they were not of a permanent character, nor did they incapacitate him long from doing his ordinary work. A decree for \$750 will be a fair compensation, and is, accordingly, ordered.

F. A. Wilcox, for the libellant.

W. W. Goodrich, for the claimants.

The Vermont Farm Machine Company v. Marble.

THE VERMONT FARM MACHINE COMPANY AND OTHERS

vs.

E. M. MARBLE, COMMISSIONER OF PATENTS. IN EQUITY.

In a suit in equity, brought under § 4,915 of the Revised Statutes, against the Commissioner of Patents, in the Circuit Court for the District of Vermont, to obtain an adjudication that the plaintiffs were entitled to a patent, which the Commissioner had refused to issue, he accepted service of the subpoena, to have the same effect as if duly served on him by a proper officer, and acknowledged receipt of a copy, but did not appear in Court nor make any objection to proceeding to a decree. After hearing the plaintiffs, a decree was made in their favor. A new Commissioner moved for a rehearing, principally on the ground that the Court had no jurisdiction: *Held*, that the motion must be denied.

The exclusive jurisdiction, under § 4,915, is not in the Supreme Court of the District of Columbia.

The Circuit Court in Vermont had general jurisdiction of the subject, and the Commissioner, by accepting service, consented to be found in the District of Vermont, and his consent is binding on his successor.

(Before WHEELER, J., Vermont, April 12th, 1884.)

WHEELER, J. The bill was brought for an adjudication that the orators were entitled to a patent, pursuant to § 4,915 of the Revised Statutes. The defendant accepted service of the subpoena, to have the same effect as if duly served on him by a proper officer, and acknowledged receipt of a copy, but did not appear in Court, nor make any objection to proceeding to decree. After hearing the orators, a decree was made and entered in their favor, (*ante*, p. 32.) The present Commissioner now moves for a rehearing, principally upon the ground of alleged want of jurisdiction of this Court.

One mode of attempting to show that this Court has not jurisdiction is, by claiming that the Supreme Court of the District of Columbia has exclusive jurisdiction. The language of this section, however, seems to preclude this idea. It

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reads: "Whenever a patent, on application, is refused, either by the Commissioner of Patents, or by the Supreme Court of the District of Columbia, upon appeal from the Commissioner, the applicant may have remedy, by bill in equity." This seems to clearly imply that the remedy may be elsewhere. (*Whipple v. Miner*, 15 *Fed. Rep.*, 117.)

Another, and the principal, mode is, by claiming that no Circuit Court of a District away from the Patent Office, and in which the Commissioner does not reside, can acquire jurisdiction of such cases. The Circuit Courts have original jurisdiction: "Ninth. Of all suits at law or in equity arising under the patent or copyright laws of the United States." (*Rev. Stat.*, § 629.) This is, unquestionably, a suit so arising. There is no restriction upon proceeding in these Courts in such cases, except that civil suits against inhabitants of the United States are not to be brought by original process in any other District than that in which the defendant resides or is found at the time of service. (*Rev. Stat.*, § 739.) The Court had general jurisdiction of this subject, and the defendant, by his acceptance of service, consented to be found in this District, and did not appear in Court to object to being bound by his consent. In *Ex parte Schollenberger*, (96 *U. S.*, 369,) Mr. Chief Justice Waite, in delivering the opinion of the Court, says: "The Act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the Courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and, certainly, jurisdiction will not be ousted because he has consented." Here, no question was made before. Now, when one on this subject is made, it is not whether the Commissioner can be compelled to answer, but whether he can consent to be sued away from the seat of Government and his residence. *Prentiss v. Ellsworth*, (*Mirror of Pat. Off.*, 36; *Law's Dig.*, 108; 2 *Wharton's Dig.*, 6th ed., 415,) raised the question as to the compulsion, and not as to the

consent, and it was held, upon apparently sound reasoning, by Randall, J., that the Commissioner could not be compelled, by process issuing out of the Circuit Court for the Eastern District of Pennsylvania, to answer there. The question of jurisdiction founded on consent did not arise.

It is further objected against the jurisdiction here, that the Court here could not compel obedience of the Commissioner, at the Patent Office, to its decree. It is to be presumed, however, that a high officer of a Department of the Government will do his duty without compulsion, or even command, from any quarter, especially in a matter where he has no interest, nor the Government any, except that the duty be done. This provision of the statute is framed according to this view. The Court does not decree that the Commissioner shall issue a patent, but only, "may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent," &c. Granting the permission expressed the will of Congress, which would be sufficient. Neither the adjudication, nor issuing the patent under it, will conclude any individual rights. The validity of the patent will be open to trial under the law. But, if it is not granted, no suit for infringement can be brought, and the right to the invention cannot be judicially tested. This jurisdiction has been exercised without challenge, except in *Prentiss v. Ellsworth*, before cited. (*Ellithorp v. Robertson*, 4 *Blatchf. C. C. R.*, 307.)

As this case is now considered, the jurisdiction upon the consent of the Commissioner seems to be ample. The question involved in the case on the merits was purely one of law, requiring the production of no models or exhibits, and no personal attendance, and might well be submitted anywhere. Whether, under the circumstances, it should be submitted here, rested in the discretion of the Commissioner. His act in this respect is binding upon his successor, like any other

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lawful act, and it oppresses no one. This ground presents no reason that appears to be sufficient, for opening the case.

All the grounds now urged on the merits of the application for the patent were fully considered before, and no sufficient reason appears for going over the ground again.

The motion is denied.

Frank T. Brown, for the Commissioner of Patents.

William E. Simonds, for the plaintiffs.

THE HOLYOKE WATER POWER COMPANY

vs.

THE CONNECTICUT RIVER COMPANY. IN EQUITY.

The rights of the Connecticut River Company, in respect to obstructing the flow of the water of the Connecticut River, in the State of Connecticut, for the purpose of improving its navigation, examined and defined.

The effect of the structures already made by that company in the river examined, and held not to be injurious to the works of the Holyoke Water Power Company, in Massachusetts, and not to be the cause of legal damage.

The carrying of the obstruction of the flow of the water to a greater extent than now would cause pecuniary injury to the Holyoke Company, and must be enjoined, because Connecticut has no right to authorize such obstruction, with such effect on the works of the Holyoke Company, in Massachusetts.

(Before SHIPMAN, J., Connecticut, April 23d, 1884.)

SHIPMAN, J. The Connecticut River Company was incorporated in the year 1824, by the General Assembly of the State of Connecticut, "for the purpose of improving the boat navigation of Connecticut River," a navigable stream, and

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was empowered, among other things, to remove obstructions from the channels and bars of said river, from and above the bridge at Hartford to Springfield, to lock the falls at Enfield on said river, to make channels to aid them, to construct a canal on either bank of said river, near said falls, and to construct a dam or dams for the purpose of entering and leaving the locks, "provided the extension and form thereof shall be such as shall not prevent the convenient passage of boats and lumber down the river, nor obstruct the passage of fish," to demand and receive specified tolls from every boat passing up said river, or through the locks, and to purchase, hold, lease or alien mill seats or manufactories upon or near Enfield Falls. The locks and canals were to be and were constructed under the direction of a board of commissioners, who were named in the charter, and who were authorized to direct further improvements to be made, if, after the completion of the works, such improvements should become necessary.

Under this charter, the defendant, before 1829, built a dam from the west bank into the river, at Enfield Falls, and also built a canal upon the west side of the river, about five and one-half miles long, with the necessary locks and other works. In 1829, the water of the river was turned into the canal, and, since then, boats engaged in the navigation of the river have continuously passed through the canal, and so have avoided the difficulties incident to the passage of Enfield Falls. The defendant has also continuously leased the use of the water and water power in said canal to the occupants of mills upon its banks.

Upon the defendant's application to the board of commissioners to examine, approve and allow certain proposed dams in the river, the commissioners, on September 3d, 1849, found and authorized as follows: "That the depth of water at and above the northern termination of said canal is not sufficient for the safe and easy passage of boats into and out of said canal, at low stages of water, and that it is expedient and necessary that the depth of water should be increased. We do also find, that the dam and works proposed, or in the process of erec-

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tion, in said river, and extending westwardly from the east bank of the same, are well adapted to effect that object of increasing the depth of the water, and that the same will not impede the passage of fish up said river, or the passage or floating of boats, timber or other property down the same. We do, therefore, authorize, approve of and allow the erection and completion of the dam and other works in said river, whether proposed or now in progress, as the same are hereinafter specified and described, viz.: the dam extending westerly, from the east bank of said river, four hundred and sixty-one (461) feet, and at such height as shall, at the lowest stage of water, when the water is at the height of the top of said dam, raise the water in said canal to the height of five (5) feet and nine (9) inches on the mitre-sill of the upper guard gate; also, to sink a crib at the western end of said last-mentioned dam, and continue and keep the same there, of twenty-eight feet in breadth westerly from said west end, and at such height from the bottom of said river as will leave the water two feet in depth at its lowest stage, leaving the opening in the river, from the western end of said dam to the eastern end of the old or former dam, not less than one hundred (100) feet, and from the western side of said crib, not less than seventy (70) feet, to the eastern end of said old dam; also, to make a sunken dam across the said opening of seventy (70) feet, from the westerly side of said crib to the eastern end of said old dam, by the sinking of cribs or other materials on the bottom of said river, and to make and construct said sunken dam to such height that the water shall not, at its lowest stages, ever be less than four (4) feet in depth upon and above the top or highest part of said sunken dam."

In the year 1855, the defendant made another application to the board of commissioners, "to approve, authorize and allow certain alterations on and additions to" its works and dams which had been constructed or were in progress. The commissioners decided as follows: "We do, therefore, decide, that it is inexpedient to modify or vary said order of 1849,

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but we adopt and confirm the same, so far as it specifies and fixes the depth of water at five feet nine inches on the mitre-sill of the guard lock, at low water. We believe it is better for all parties, that, so far as the action of the commissioners is concerned, it should be held as a settled point, that the water at low stages should be and continue to be at this specified depth, and that all the erections and obstructions of the company should have reference to that depth. We do, therefore, approve the erection of the eastern dam, the making of the cribs and sunken dam in the opening between the dams, but decide that certain of those cribs which are above the general level be taken down and reduced to such level, as soon as the weather and the stage of water will allow, and, in the meantime, they are to remain as they now are. As it respects the navigation down Enfield Falls, it is very inconsiderable and dangerous at the best, and, at extreme low water, is scarcely attempted or practicable, and we think the weight of evidence produced before us shows that the recent erections have not increased the danger or the difficulty. The eastern dam we think somewhat higher than necessary to secure the specified depth of water at low stages, and incline to the opinion it might properly be lowered a few inches; but, as some persons, who were understood to have been remonstrants, suggested it might be injurious to them, as they were interested in property above the Falls, we make no order on that subject."

The dams remained in the condition in which they were authorized to be by these two orders of the commissioners until 1881. The defendant fully availed itself of the permission to sink cribs in the opening between the dams, and, when they were repaired, as hereinafter mentioned, in the summer of 1881, there was, in the gap, "a pile of stone, which had been built right round on a circle, from one wing to another," about two feet below the surface of the water, at the opening. At this time about 4,000 cubic feet of water per second were flowing at Holyoke.

In 1881, the defendant's charter was amended by the

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General Assembly of Connecticut, as follows: "Whereas, the dams of the Connecticut River Company, at Enfield Falls, have become inadequate by reason of natural changes in the channel of Connecticut River, and by reason of the uneven and greatly diminished flow of water therein, making said river, for a distance of several miles below said dams, unnavigable; and whereas, to improve the navigation upon said river both above and below said dams, and to preserve and maintain the water-power of said company, it is necessary that the water in the canal of said company, and in said river above said canal, shall be of greater depth than the dams of said company, at their present heights, will allow; therefore, *Resolved by this Assembly*: Section 1. That the Connecticut River Company are hereby empowered and authorized to unite their said dams at Enfield Falls, aforesaid, so as to continue and extend the same across the Connecticut River, and to raise said dam and dams to such a height that the crest or crests thereof shall not exceed the height of seven feet above the mitre-sill of the upper guard gate or lock, at the upper entrance to said canal, as said mitre-sill now is; but the dam at the extreme west end may be fifteen inches higher than its present height, sloping on a regular incline for three hundred feet; *provided*, that said company shall construct and maintain, at the said dam or dams, and as a part thereof, subject to the approval of the fish commissioners of this State, suitable and proper fish-ways, to admit the free passage of fish up and down said river, over and above said dams, and to be kept open at such seasons as shall be necessary for the passage of fish, said fish-ways at all times to be under the direction and approval of said commissioners, or of such other authority as this State shall appoint with reference thereto." The second section related to the assessment and payment of damages which should accrue to the property of any person by reason of the exercise of the powers conferred by the amendment.

In July, 1881, the defendant began to fill the gap between the dams, and, after building a coffer dam, 40½ feet long, above and in front of the opening, built, below the dams and across

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the gap between the wings, and connecting with the old dams, a piece of new dam, 235 feet long, and, after it had settled two inches, 10 $\frac{1}{8}$ inches above the average crest of the old dam. The gap between the wings was 100 feet. The respective surveyors differ about two inches in the height of the new dam before it had settled. I adopt the measurement of the defendant's surveyor. In the new piece of dam, there is an opening 14 inches deep, and from 40 feet to 42 feet in width, for the passage of fish and lumber over the dam. The elevation of the old dam above the mitre-sill was 5 feet 9 $\frac{1}{2}$ inches. On August 19th, 1882, the surface of the water in the river was 6 feet and 4 inches above the mitre-sill. The average elevation of the new work, not including the fish-way, is 40.31 feet above the datum plane, or imaginary horizontal plane, which was established by the engineers on both sides, and which is explained in the record. The remainder of the dam, or the old dam still remaining, is about 1,288 feet long, and on an average height of 39.41 feet above the datum plane. Of the coffer dam, 332 feet in length were about 6 feet in height above the water, and the remainder of this dam was about two feet in height above the water. It was taken away late in the fall of 1881.

The Holyoke Water Power Company was incorporated in January, 1859, by the Legislature of Massachusetts, for the purpose of upholding and maintaining the dam across the Connecticut River, theretofore constructed by the Hadley Falls Company, and one or more locks and canals, in connection with the said dam, and of creating and maintaining a water power to be used for manufacturing and mechanical purposes, and to be sold or leased to be used for like purposes. The Hadley Falls Company was incorporated for similar purposes, by the Legislature of Massachusetts, in 1848, and in 1859 the plaintiff purchased its dam, canals, water privileges and land. The plaintiff thus became and is the owner of an extensive and valuable water-power upon the Connecticut River, at Holyoke, in Massachusetts, sixteen miles above the defendant's dam, and has expended large sums of money in the development and

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improvement of its property. It leases the water power to mill owners, and from such leases derives a large portion of its income. The fall is about sixty feet.

This bill was brought in September, 1881, and, after the gap had been filled by the new piece of dam which has been described, but before the work was entirely completed, alleging that this solid dam, and the raising the dam across the width of the river, as authorized by the Legislature of Connecticut, will set back the water upon the plaintiff's works, will overflow its land, impede the operation of the mills there situate, diminish the effective head of its fall, and commit irreparable injury to its property, and praying that the defendant may be ordered to remove the obstruction between the wing dams, and be enjoined against raising the dam.

The answer of the defendant admits that the gap was filled by the new dam substantially as has been stated, but denies that any damage has been done to the rights or property of the plaintiff, and alleges that it has no present intention of raising the rest of the dam, but claims that, under said amendment of 1881, it has the right to raise the whole of the dam to the height authorized thereby, and asserts that it proposes to make such erection, if it should become necessary.

The water of the river is diverted by the plaintiff, at Holyoke, into three canals, which are substantially parallel to the river, and are called the first, second and third level canals. "They are so arranged, that the water flows from the gates at the dam into the first level; from the first level, a small portion into the river, and the balance into the second level canal; from the second level, part into the third level, and a part into the river; and from the third level into the river. The third level canal is furthest from the dam and nearest to and parallel with the bank of the river, where the river bends to the westward, below the city of Holyoke." The plaintiff owns about 440 acres of land, "390 acres being building lots, and about 50 acres being mill sites; 20 acres of these mill sites are on the third level canal. The Holyoke Water

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Power Company now owns the river front, from the dam to the foot of the fall, about 9,600 feet in length, and thence about 5,500 feet further, on the west bank of the river. This last described bank of the river is the one across which the tail races of the mills on the third level canal are constructed."

The plaintiff furnished elaborate and careful computations of its hydraulic engineer, which were based upon the comparison of an extensive system of observations, taken by his employees after the construction of the coffer dam, with observations and data before such construction, for the purpose of showing that the effect of the present obstruction at Enfield Falls was to raise the water of the river at the point next adjacent to the tail-races of the mills upon the third level canal, but not to show that any water has been set back upon the plaintiff's land, or into the tail-races, or upon the works of any of the mills, as now constructed. The plaintiff's engineer, Mr. Herschel, was corroborated, to a certain extent, by the opinion of General Ellis, the engineer in charge of the surveys which had been taken since 1870, and of the works which had been constructed by the United States Government for the purpose of improving the navigation of the Connecticut.

Two other hydraulic engineers, Messrs. Worthen and Greene, criticised the accuracy of the data upon which the computations were based, and Mr. Greene denied that the property of the plaintiff is or will be injured by the present or proposed dam of the defendant, whenever the river is at the stage which he estimates to be its ordinary stage.

Two facts are conceded by all the witnesses to be true. The first is, that, at low water, which is generally stated to be a flow of 4,000 cubic feet per second at Holyoke, the Connecticut River between Holyoke and the defendant's dam, as it existed before the gap was filled, was nearly a still pond. Mr. Herschel says, that "a slope of only four inches sufficed to convey 4,000 cubic feet per second from Holyoke to the Enfield dam." Therefore, any material additional obstruction placed upon the Enfield dam of 1849 or 1855 would be per-

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ceptible in the river at Holyoke, at the time of very low or low water. The second conceded fact is, that the defendant's dam, as it was, or as it is now constructed, is so low, that, as the volume of water increases in the river and flows over the dam, there is a point where the present dam would cause no injury at Holyoke. The amount of the rise of the water which is ordinarily caused by the present dam, the fact of injury, the length of time during which any injury would be perceptible, and the point at which any injury would cease, are controverted questions.

The most reliable testimony upon the amount of the rise in the river, resulting from the increased obstruction at Enfield Falls, is derived from the records of the river heights at the Springfield toll bridge, which were kept by the keeper of the bridge from March, 1881, to December, 1881. From these records, it is shown, that, when 4,000 cubic feet of water per second were passing Holyoke, the water at Springfield was, after the construction of the coffer dam, $\frac{1}{16}$ of a foot higher than it was before July, 1881. It is to be observed, that these figures state the effect between July and December, and that, during the greater portion of the time, the coffer dam was a part of the obstruction. The other results are given in the following table:

Cubic feet per second, at Holyoke.	Increase.
7,000.....	0.28
10,000.....	0.25
13,000.....	0.24
16,000.....	0.22
19,000.....	0.19
22,000.....	0.13

At 4,000 feet, the effect at Holyoke would be the same as at Springfield. From and after the flow of 7,000 cubic feet, the effect at Holyoke would be about half that felt at Springfield.

The observations which were taken at Holyoke and near Enfield Falls, under the direction of the plaintiff, show a

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greater effect than that which is here stated, but the Springfield observations I regard as more reliable.

In order to determine whether any damage will be caused by the present dam, the length of time during which a rise at Holyoke will continue is important. Mr. Herschel, collecting the scattered days of the year, in the order of their dryness, into months, and arranging the months in like order, estimates, that, during the driest month, the flow of the river at Holyoke is 4,092 cubic feet per second, and is during the second month 4,886 cubic feet, and is during the third month 6,515 cubic feet, and is during the fourth month 8,225 cubic feet, and is about 47,000 cubic feet per second during the wettest month.

General Ellis, who had been very familiar with the river between Enfield dam and Holyoke, from having superintended the Government surveys, was of the opinion, that, if the gap was filled up, so that the crest of the solid dam should average 39.1 feet above the datum plane, which would be $3\frac{1}{8}$ inches below the average crest of the old part of the present structure, the river would be raised a foot during about one month, and, in his report, recommended that the opening should be thus closed by the Government. Assuming that the gap was filled up by a structure eighteen inches above the mean level of the old dam, and 280 feet long, he testified that this obstruction "would certainly raise the water at Holyoke in the lower stages of the river. The reasons are, that the obstruction contracts the water way at Enfield, and thereby raises the water flowing over the rest of the dam. This sets the water back at Holyoke, at the lower stages of the river, almost exactly the amount of the rise at Enfield. * * * Exactly what part of the year this effect would take place, I am not able to state of my own knowledge. As the river rose from the state of low water, the effect would diminish." In his affidavit, made September 13th, 1881, to be used upon the motion for a preliminary injunction, he said: "There would probably be, from the best data in my possession, and my general knowledge of the river, an average of about

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thirty days in each year when the water would be one foot lower, with the gap as it existed eight years ago, than with the gap filled up as at present." It is evident that General Ellis was intentionally vague as to the increase of flow which would overcome the effect of the obstruction.

From the testimony in the case, no certain and indisputable conclusion can be reached, either as to the length of time in each year in which the influence of the present dam will be known at Holyoke, or as to the amount of the flow of water at which the influence of the dam will cease to be felt; but my opinion is, that, with a flow of 7,000 cubic feet per second, the effect will be unknown, and that such effect will be perceived at Holyoke between thirty and ninety days, during the driest part of the year.

Putting aside the testimony for the defendant, certain facts tend strongly to satisfy me that the effect of the present structure will not be protracted and will not be injurious. They are as follows: 1st. When the observations in regard to the rise of the water were taken, the coffer dam, the dimensions of which have been given, was the effective obstruction in the river, in addition to that caused by the pre-existing dam. 2d. General Ellis' indisposition to commit himself in regard to the point at which the effect will be unknown, when he was testifying for the plaintiff, and his admission that, when he was testifying before the Legislative Committee, which had the amendment of 1881 under consideration, he might have said, in substance, that, if the dam was raised fifteen inches, the back water would be overcome by a slight rise. 3d. His recommendation to the Government to close the gap, when it was apparent that such a course would raise the water about one foot, during thirty days in the year. He was, undoubtedly, making recommendations which he knew it would be perfectly safe for the Government to act upon, and which were probably inside the limit which he thought that careful prudence would suggest.

The next point is as to the amount of damage which is caused by the present structure. The rise is simply a rise

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within the banks of the river. It overflows nothing, it occupies no land. As the works of the existing mills are arranged, it is impossible for this obstruction to set back any water upon their wheel pits or canals. The fall on the third level canal, as computed by Mr. Herschel, in the order of his arrangement of months, is as follows: dryest or first, 25.10 feet; second, 24.80; third, 24.20; fourth, 23.65; fifth, 23.10; sixth, 22.35; seventh, 21.65; eighth, 20.85; ninth, 20.00; tenth, 18.85.

The usual lease heretofore in use has been for a fall of 24 feet. It is, of course, practicable for the lessors and lessees of power at Holyoke to alter their indentures, and for the lessees to alter their structures, so as to utilize every inch of fall that is attainable during the dryest portion of the summer; and it may be possible for the plaintiff so to arrange its contracts with the present lessees, or with the purchasers of unsold mill powers, as to derive a pecuniary benefit from the slight additional amount of fall during this dry period, but the damage which will accrue to the plaintiff from the present Enfield dam seems to me to be theoretical and fanciful rather than actual. In the months of August and September, it might have a nominal advantage if the gap had not been filled, but I cannot deem it reasonable that no change should be permitted in the structures for the benefit of navigation sixteen miles distant from Holyoke, in order to furnish the Holyoke Company with an advantage which consists far more in theory than in fact. During nine or ten months in the year this obstruction will not be known at Holyoke, during two or three months it can be perceived, but it practically does no damage to the owners of the water power.

In regard to the raising of the dam above its present height, to the point authorized by the amendment of 1881, I am of opinion that it would produce to the plaintiff a pecuniary injury for a period of six or seven months in the year, by the diminution of its fall, but not by an overflow of its land, or a taking of its property—an injury which is called a conse-

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quential injury. (*McKeon v. Delaware Division Canal Co.*, 49 Penn. St., 424.) The defendant admits, in its answer, that it claims the right to raise its dam to the point authorized by the amendment, and that it proposes to do so, whenever necessary.

The defendant insists, that, inasmuch as the State of Connecticut authorized the addition to the dam for the purpose of improving the navigation of Connecticut River within the limits of the State, any consequential injury, not amounting to the taking of land, which is occasioned, in the exercise of ordinary care, by reason of such improvement, to the land of a riparian proprietor, is *damnum absque injuriâ*; and it may be considered as settled, that, where a State, by itself or by its agents, in the construction of works authorized or directed by the Legislature of such State, for the benefit of the navigation of a navigable river within its borders, causes, without malice and in the exercise of ordinary care, a necessary consequential injury to land within its borders, no relief will be granted against such injury. The State and Federal Courts concur in the assertion of this principle. The Supreme Court of Errors of Connecticut says, in regard to works erected for the improvement of the navigation of Connecticut River: "The public, being the owners of this river, have an unquestionable right to improve the navigation of it, without any liability for remote and consequential damage to individuals." (*Holister v. Union Co.*, 9 Conn., 436.) "Acts done in the proper exercise of Governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking, within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority. * * * * We have examined the decisions of the Courts of Illinois, and others to which we have been referred by the plaintiffs in error, but in none of them was it decided that a riparian owner on a navigable stream, or that an adjoiner on a public high-

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way, can maintain a suit at common law against public agents, to recover consequential damages resulting from obstructing a stream or highway in pursuance of Legislative authority, unless that authority has been transcended, or unless there was a wanton injury inflicted, or carelessness, negligence or want of skill in causing the obstruction." (*Transportation Co. v. Chicago*, 99 U. S., 635.)

In this case, the injury will be caused to property beyond the limits of Connecticut, and the question arises, whether the doctrine which has been asserted is applicable to this state of facts. This question has never, so far as I can ascertain, been decided by the Courts of this country. The question has arisen, whether, by virtue of the right of eminent domain, one State can take, or subject to public use, land in another State, and the decisions have naturally been against such a power. (*Furnum v. Canal Co.*, 1 Sumn., 46; *Salisbury Mills v. Forsaith*, 57 N. H., 124; *Wooster v. Great Falls Co.*, 39 Me., 246; *United States v. Ames*, 1 W. & M., 76.) In two cases which have recently arisen in Federal Courts, and which involved the right of a State to regulate or to improve the navigation of a river wholly within its limits, the judges have carefully limited their decisions to the facts in the cases. (*Escanaba Co. v. Chicago*, 107 U. S., 678; *Huse v. Glover*, 15 Fed. Rep., 296.) Important suggestions which bear upon the questions in this case are made by Judge Treat, in *Rutz v. St. Louis*, (7 Fed. Rep., 438,) and by Mr. Justice McLean, in *Palmer v. Comrs. of Cuyahoga Co.*, (3 McLean, 226.)

The rule which has been referred to is based upon the principle, that the improvement of the navigation of navigable rivers within a State, is a part of the State's governmental duties, and that the work which is done towards such improvement is done in the discharge of the governmental powers of the State, and that the land of the riparian proprietor within the State is subject to the just exercise of this power, and that, when the State undertakes to exercise its governmental power, the public good is paramount to the

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consequential injury to land which is incidentally and necessarily affected by the improvement. The land is under the jurisdiction of the State, and the State derives the power to inflict remote and consequential injuries upon it by virtue of such jurisdiction. The owner of land abutting upon a navigable river owns it subject to the right of the State to improve the navigation of the river, because the land is within the governmental control of the State, but it seems to me that the State obtains, by virtue of its governmental powers, no control over or right to injure land without its jurisdiction. Jurisdiction confers the power and the right to inflict consequential injury, but, where no jurisdiction exists, the right ceases to exist. It is a recognized principle, that the statutes of one State, in regard to real estate, cannot act extra-territorially. As Connecticut has no direct jurisdiction or control over real estate situate in another State, it cannot indirectly, by virtue of its attempted improvement of its own navigable waters, control or subject to injury foreign real estate. If this resolution is a bar to an action for any consequential injury to land, or to rights connected with land, in Massachusetts, Connecticut is acting extra-territorially.

Let there be a decree enjoining the defendant against any further raising of its present dam, and against constructing a new dam or dams to a greater height than the height occupied by the respective portions of the present structure.

N. A. Leonard and Alvan P. Hyde, for the plaintiff.

Henry C. Robinson, Charles E. Perkins, Charles H. Briscoe and Arthur F. Eggleston, for the defendant.

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ALONZO KIMBALL *vs.* JOHN G. CUNNINGHAM. IN EQUITY.

The claim of letters patent No. 149,896, granted to Halmeah Van Geasen, April 21st, 1874, namely, "As an article of manufacture, a size or quality mark or ticket, composed of two layers of paper, between which is secured the head or bridge of the fastening springs *c*, which extend through the bottom layer, and are adapted to fasten the ticket to a fabric," is a claim to constructing a tag of two layers of paper, and placing the bridge, or the head of the staple, between the layers, which are then fastened together, and is not infringed by a tag having a like staple secured by an eyelet, the lips of which clamp the bridge or head of the staple to the underside of the tag.

(Before BENEDICT, J., Eastern District of New York, April 24th, 1884.)

BENEDICT, J. This case comes before the Court upon a motion for a preliminary injunction to restrain the defendant from making and selling a certain form of tag or ticket used for ticketing clothes and other similar fabrics, and alleged to be an infringement upon letters patent No. 149,896, issued to Halmeah Van Geasen, April 21st, 1874, and owned by the plaintiff.

The plaintiff's patent is for an invention the object of which, as stated in the patent, is to provide a ticket capable of being more readily attached than those heretofore in use. The invention is stated to consist in constructing tickets with metallic points at the back, which, upon being pressed against the fabric, will pass through the same, and, by being bent back of the cloth, will effectually secure the ticket to the cloth in a neat and strong manner. The claim reads thus: "As an article of manufacture, a size or quality mark or ticket, composed of two layers of paper, between which is secured the head or bridge of the fastening springs *c*, which extend through the bottom layer, and are adapted to fasten the ticket to a fabric." The invention here sought to be secured does not, as insisted by the plaintiff, consist in the employment of a tag having soft, metallic prongs securely fastened to the tag, so as to attach it readily to the goods. If that were the invention, the

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patent would be void for want of novelty. What the patent purports to secure is the method of attaching the fastening springs or staple to the tag. No more is asserted in the claim, and the patent is limited to the method there described. The novelty of the invention thus sought to be secured consists in the method adopted for securing the staple to the tag. The distinctive feature of this method is constructing the tag of two layers of paper or other similar material, and placing the bridge, or the head of the staple, between the layers, which are then pasted, or otherwise fastened, together. The patent is, by its terms, confined to a ticket having a tag which is composed of two layers fastened together, and a staple which is secured to the tag by placing its bridge or head between the layers of the tag.

The defendant makes a ticket having a staple similar to the staple of the Van Geasen ticket, secured to a tag by an eyelet, the lips of which clamp the bridge or head of the staple to the underside of the tag. Such a ticket does not, in my opinion, infringe the plaintiff's patent, for the reason, that a tag composed of two layers is not necessary in the defendant's tag, and the staple is not secured to the tag by placing the staple between any layers of the tag. Clamping the head of the staple to the underside of the tag is not, in my opinion, equivalent to securing the head of the staple by placing it between the layers of the tag and pasting the layers together.

The motion for an injunction is denied.

Townsend, Dyett & Einstein, for the plaintiff.

William C. Witter, for the defendant.

In re Accounts of the Shipping Commissioner of the Port of New York.

IN THE MATTER OF THE ACCOUNTS OF THE SHIPPING COMMISSIONER OF THE PORT OF NEW YORK.

The question considered, whether the salaries paid by the Shipping Commissioner of the Port of New York to his deputies, for the year 1882, were reasonable.

A salary of \$3,648 to each of three sons of his, as a deputy, held not to be reasonable.

The administration of the office by the Shipping Commissioner reviewed, and the conclusion reached, either that he was so blinded by parental interests that he could not exercise an intelligent judgment respecting the economical and decorous administration of his office, or that he corruptly exercised his powers and opportunities, to farm out its revenues, as spoils for family distribution.

Regulations made as to the number of clerks to be employed, and their salaries.

The Commissioner ordered to show cause why he should not be removed from office.

(Before WALLACE, J., Southern District of New York, May 5th, 1884.)

WALLACE, J. The immediate question presented by the report of the master, and the motion made on behalf of the Shipping Commissioner to confirm the report, is whether the salaries paid by the Shipping Commissioner to his deputies for the year 1882 were reasonable. Having filed his account of the receipts and expenses of his office for the year 1882, an order was made, pursuant to the established mode of procedure since the year 1876, by which the account was referred to a master for an examination and report to the Court, upon notice to the United States Attorney. Pursuant to that order, Mr. Gutman, the master, in February, 1883, filed his report, showing that the receipts of the office for the year 1882 were \$22,531 50, and the expenses for the year were \$22,531 50. Among the items of expenses in that account were three, of \$3,648 each, paid by the Shipping Commissioner to his three sons, for their salaries as deputy Shipping Commissioners. Upon the motion to confirm that report, objection was made by the United States

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Attorney, that the salaries paid by the Shipping Commissioner to his deputies were excessive. Thereupon, and on the 2d of October, 1883, this Court made an order referring back the report to the master, and directing him to take such proof as might be produced by the Shipping Commissioner and by the United States Attorney, and report explicitly upon the reasonableness of these salaries. Although, since 1875, the accounts of the Shipping Commissioner have been returned annually, have been passed by a master, and, on several occasions, have been objected to by the United States Attorney, and considered upon such objections by my predecessors in office, this is the first instance in which those accounts have been challenged by opposing proofs on the part of the United States Attorney. There is no statute which makes it the duty of the District Attorney to scrutinize or challenge these accounts, and it is doubtful if he has any authority in the premises except such as is conferred upon him permissively by the order of the Court; and for this reason, probably, the predecessors of the present United States Attorney deemed it beyond their province to controvert the correctness of the accounts, beyond criticising items which seemed objectionable upon their face. The last occasion when the accounts were specially investigated was in 1878, when objections were filed by the United States Attorney to the accounts for the year 1877. It then appeared, that the Commissioner had paid to each of his three sons, for their services as deputies, during that year, a salary at the rate of \$3,800 per annum, two of them being paid for the whole year, and one of them for six months. Judge Blatchford, in considering the objections, and passing upon the account, (16 *Blatchf. C. C. R.*, 92,) examined with particularity the financial history of the office from its inception, and considered the principles and items of the accounts; and, referring to the question of salaries paid by the Commissioner to his sons, used the following language, in his opinion: "As to the allegation that, on the deposition of the Shipping Commissioner, the master should have reported that the salaries, at the rate of \$3,800 a year, paid to the three deputy commis-

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sioners, F. C. Duncan, G. F. Duncan, and C. D. Duncan, were entirely too large for the work performed by them, there is nothing to show that any such point was taken by the District Attorney before the master. Nor was any evidence introduced before the master, by the District Attorney, to show that the salaries of the deputies were too large for the work performed by them. No witness expresses an opinion to that effect, nor was the Shipping Commissioner asked whether he could not have obtained competent persons to discharge the duties so performed for a less compensation, nor was any evidence given that he could. The arrangement made is testified to have had the sanction of each of my predecessors, Judges Woodruff and Johnson. The three deputies named were deputies from the beginning. The arrangement was one which sanctioned a salary of \$4,000 to each of them, if the fees of the office would pay it. It has never exceeded that sum. The Commissioner and the deputies had a right to rely on the arrangement, until it should be shown, on notice and hearing, that the salaries ought to be reduced. These observations cover the above named accounts. I do not intend to say, however, that the salaries of the deputies and of the subordinates ought not to be reduced and their number fixed for the future, nor do I intend to say that they ought."

As the objections to the accounts are now presented, I am relieved from any embarrassment arising from the decisions of my predecessors, inasmuch as they were called upon to consider such objections when there was no evidence to controvert the case made by the Commissioner himself, and, practically, only his side of the controversy was exhibited. These decisions, while authoritative, and, perhaps, conclusive, as an auditing of past accounts, do not stand in the way of considering *de novo* the question of the reasonableness of the salaries paid in 1882, unless, as stated in the opinion of Judge Blatchford, "the Commissioner and the deputies had a right to rely on the arrangement," (in the past) "until it should be shown, on notice and hearing, that the salaries ought to be reduced."

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The proofs taken before the master are voluminous, and embrace a wide range of investigation, notwithstanding the strenuous efforts on the part of the Commissioner to narrow the field of investigation. It was quite impossible, however, to confine the proofs to the value of the deputies' services in 1882. Whether it was necessary that these deputies should be employed for that year, and what was a fair compensation for their services then, were questions which could not well be resolved without a comparison of the business and duties of the office in previous years, and the relative value of the services then and now. This led to an inquiry into the nature and extent of their services in the past, and, finally, to an extended examination into the business of the office generally, and into the duties of the Commissioner and of the deputies and the various subordinates, during the whole period of its existence. This examination has been sufficiently comprehensive and thorough to possess the Court not only with the material facts respecting the primary subject, but also concerning the past administration of the office, which it is very much to be regretted were not brought to the attention of my predecessors. It will not be profitable to attempt a recapitulation of the evidence. It is due to the Shipping Commissioner, however, to state, that witnesses of high respectability and intelligence have commended his administration of the office generally, and approved as reasonable the salaries which he has paid his sons. The reasons why I cannot concur in their opinion, and must disapprove the findings of the master, may be briefly stated, and rest upon a few salient but controlling considerations.

The duties of the Shipping Commissioner are not intricate or arduous, but they are useful and various, and require good judgment and executive capacity. He is the responsible head of the office, and is charged with the supervision of its manifold operations, and incurs some financial risks, because he is obliged to pay the expenses of maintaining the office and of conducting its business, including rent and the pay of employees, out of the receipts of the office. He must rely ex-

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clusively upon the fees of the office to meet the expenses as well as his own salary. If these fees fall short, he has no recourse upon the treasury of the United States. The statute that creates the office provides that the salary, fees and emoluments of the Commissioner shall in no case exceed \$5,000 per annum. This salary was deemed adequate, by the legislative department of the Government, to compensate him for all his responsibilities and services, however onerous and exacting they might be. The duties and responsibilities of the Shipping Commissioner are, of course, far more important and onerous than those of any of his subordinates. Their duties are either clerical, such as those of book-keepers or accountants, or they are services of a lower grade. The law contemplates that these duties are to be discharged by the Commissioner himself, with such clerical assistance as may be necessary. It enacts that "any Shipping Commissioner may engage clerks to assist him in the transaction of the business of the shipping office, at his own proper cost, and may, in case of necessity, depute such clerks to act for him in his official capacity." (*Rev. Stat.*, § 4,505.) As appears by the proofs, the services which the subordinates of the higher grades perform in the office are almost identically such as were rendered by clerks in private shipping offices in New York City. The Commissioner recognized this, by selecting all his principal assistants, exclusive of his own sons, from this class of employees, persons who had been clerks in private shipping offices. Inasmuch as his own salary and emoluments were fixed by the law at \$5,000, and this standard of compensation was adopted by Congress as a sufficient remuneration for his risks as well as his services, the action of the Commissioner in appointing five deputies to discharge clerical duties, as soon as he had occupied the office long enough to ascertain its probable income from fees, three at a salary of \$3,500 each, and two at a salary of \$3,000 each, starts the suggestion, that he had gravely misconceived the spirit of the law under which he was to administer the office. But, when it appears that, in the ensuing year, 1874, these five deputies were salaried at

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\$3,900 each, that four of them were his own sons, and that one of these sons was only nineteen years old, with no more experience or qualifications for the place than his years would imply, a very cogent inference arises, that he had conceived a scheme for administering his office, which was not only illegitimate, as a radical departure from that contemplated by law, but which was utterly repugnant to all notions of economy and decency, if it was not tainted with a corrupt motive. In 1875, these five deputies were salaried by him at \$4,000 each. In 1874, after paying his own salary and those of the deputies, and the other expenses of the office, there remained, out of receipts of fees amounting to \$55,000, the sum of \$126 to be paid into the Treasury of the United States. In 1875 the fees were \$51,000, and \$433 less than the expenses. From 1875 to the present time the expenses of each year have absorbed the receipts. The theory of the Shipping Commissioner is, that, with the concurrence of Judge Woodruff, he made an arrangement with his deputies, by which a salary of \$4,000 a year to each of them was to be allowed, when the fees of the office would pay it, because the receipts of the office were fluctuating, and at times the salaries would, therefore, have to be much less; and it appears that, in 1876, they were allowed only \$2,450 each, the receipts having fallen, in that year, to the sum of \$29,774. Yet, in 1877, when the receipts were still less, the deputies' salaries were allowed at \$3,800 each, and it is noticeable, that, in this year, there were but four clerks employed in the office, and they were only paid, in the aggregate, the sum of \$2,587. In 1878, the number of deputies was reduced to four, the four sons of the Shipping Commissioner being retained, and they were paid \$3,800 each. Subsequently, one of them retired, and since then three deputies have been retained, all of them the sons of the Commissioner. In 1882, the year specially under consideration, these three deputies have been paid \$3,648 each, while the pay roll shows that only two clerks were employed, one of whom was paid \$960, and one \$655,

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and the receipts of the office were \$22,531, which are just balanced by the expenses.

These figures, standing alone, are a sufficient commentary upon the extravagance and impropriety of the arrangement respecting deputies and their salaries which was made by the Shipping Commissioner, and which, according to his statement, was approved by Judge Woodruff. But, it is now shown, by the testimony, that, during all these years, until 1881, there were experienced and competent clerks employed in the office, by the Commissioner, who were not only fully qualified to perform the services of the deputies, but who actually did perform substantially the same services, at salaries of from \$20 to \$25 per week; and the proofs also show, that such compensation is what is generally allowed for similar services in the private shipping offices of New York city.

In view of this testimony, there can be but one of two conclusions; either that the Commissioner has been so blinded by parental interests that he could not exercise an intelligent judgment respecting the economical and decorous administration of his office, or he has corruptly exercised his powers and opportunities, to farm out its revenues as spoils for family distribution.

The idea that Judge Woodruff, or either of my other predecessors in office, would have sanctioned such a state of affairs as is now shown to have existed, is not to be harbored for a moment. They were misled, undoubtedly, by a plausible presentation of the facts on the part of the Shipping Commissioner, and were called upon to decide upon an *ex parte* hearing, or upon proofs which did not exhibit any countervailing evidence.

The following general conclusions are reached, and, under the power of this Court to regulate the mode of conducting the business of the Shipping Office, will, for the present, be adopted as rules for the regulation of the business of the office:

1. That the employment of one chief clerk, deputized, in

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case of necessity, to act for the Shipping Commissioner in his official capacity, and to be allowed a salary not to exceed \$2,500 per annum, may be justified by the demands of the office, and is authorized.

2. Three other clerks at salaries not to exceed \$1,200 each, or two at salaries not to exceed \$1,600 each, in the discretion of the Commissioner, may also be employed.

3. All compensation received by the Commissioner, or his subordinates, for services rendered during office hours, to owners or masters of vessels or to seamen, are to be accounted for and returned with the receipts of the office.

Although the master's report must be disapproved, the Court has no power to compel the Shipping Commissioner to pay into the Treasury of the United States any fees which he has not sufficiently accounted for. Although the Court is empowered to regulate the mode of conducting the business of the office, and is invested with complete control of the same, its powers are supervisory, not plenary, and it acts in an administrative rather than in a judicial capacity. The receipts of the office belong to the United States. The Government can claim them or relinquish them at its option. If they have been misappropriated, the United States can sue for them and recover them. The Court is not a competent party to such a controversy. Nor should the Court undertake to adjudicate upon the rights of the Shipping Commissioner, or of the Government, in a proceeding to which the United States are not a party, because its judgment would not conclude either. The Government is not a party merely because the United States Attorney has intervened in the proceeding, at the direction of the Court. He did not come into the proceeding by the authority of any statute which expressly, or by implication, makes it his duty, or his privilege, to represent the United States, nor did he appear upon the retainer, or at the request, of any Department of the Government, which can be deemed to represent the United States. When a suit is brought to which the United States are a party to the rec-

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ord, all the questions of fact and law upon which the Government and the Shipping Commissioner are entitled to be heard, can be appropriately and conclusively determined. So far as the latter has acted conformably to regulations prescribed by this Court, he will be, undoubtedly, protected, because the administrative power to make the regulations is lodged with the Court; and it may be well urged that it is immaterial whether his acts have received a subsequent sanction, or were sanctioned in advance. It is not necessary nor is it expedient to express any opinion now, as to whether the Shipping Commissioner was justified in assuming, from the action of my predecessors prior to 1882, that he was authorized to retain his sons as deputies and pay them the salaries he has paid them. If a suit shall be brought, it may become pertinent to inquire whether such action was induced by misrepresentations or suppressions of material facts on the part of the Shipping Commissioner, which were intended and effectual to mislead. Neither is it intended, by the present decision, to preclude him from a full opportunity of reviewing and overturning the conclusions of fact which have been reached and expressed in the present proceeding.

The statute authorizes the Court to remove from office any Shipping Commissioner "whom the Court may have reason to believe does not properly perform his duties." (*Rev. Stat.*, § 4,501.) The permissive language in such a statute is mandatory. Where power is devolved, by statute, upon a public body or officer, to do an act which concerns the public interests, its exercise is an imperative duty whenever the occasion calls the power into activity. What my impression is respecting the official conduct of Mr. Duncan, upon the proofs and records used upon this motion, has been sufficiently indicated, but he is entitled to a full hearing, and should be given an opportunity, if he desires to retain the office, to show that he has properly performed his duties.

An order will be entered denying the motion to pass the accounts for 1882, and directing the Shipping Commissioner

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to show cause before me, on the 10th day of May next, at 10.30 A. M., why he should not be removed from office.

Elihu Root, (*District Attorney*,) for the United States.

Enos N. Taft, for the Shipping Commissioner.

THE WORSWICK MANUFACTURING COMPANY AND ISAAC KIDD

vs.

THE CITY OF BUFFALO, AND GEORGE R. POTTER AND OTHERS,
AS FIRE COMMISSIONERS OF THE CITY OF BUFFALO.

Letters patent No. 171,190, granted, December 14th, 1875, to Edward O. Sullivan, for improvements in harness for fire engines, are valid.

Claim 3 of the patent, namely, "3. The combination, with a harness for a fire-engine or like apparatus, of a device for suspending said harness above the place occupied by the horse when attached to the apparatus, substantially as and for the purpose set forth," does not claim the abstract idea of suspending a harness from the ceiling in a particular place.

As Sullivan was the first to enter this field of invention, such claim should be construed broadly, to cover any similar apparatus which suspends a harness in substantially the same manner.

On the question of novelty, it was held, that the defendants had succeeded only in casting doubt, but had not proved the want of novelty beyond a reasonable doubt.

(Before COXE, J., Northern District of New York, May 8th, 1884.)

COXE, J. The complainants are the owners of letters patent No. 171,190, granted, December 14th, 1875, to Edward O. Sullivan, for improvements in harness for fire engines. The patent relates not only to the construction of the harness, but also to the manner of suspending it above the horse. The object of the invention is to enable the horses to be kept un-

harnessed until the moment of the alarm, and then to attach them to the engine with great expedition. One man is thus enabled to do the work of three under the old system. The harness is made in sections, is permanently fastened to the neap or thills and suspended from the ceiling by means of straps and spring catches, so that it may be dropped upon the horse and quickly secured.

Before the use of this apparatus horses were kept continually in harness night and day. The result was, that they were irritated and galled, and the harness was injured and soon destroyed, by the constant rubbing which this irritation occasioned.

There can be no doubt regarding the utility of the invention. Its advantages may be summarized as follows: Relief to the horses; expedition in reaching the fire; durability and reliability of the harness; economy in the employment of firemen and harness makers. And, when it is remembered that promptness in arriving at a fire has often prevented a great conflagration, the indirect benefits can hardly be estimated.

The claim in controversy is the third. It is in these words: "3. The combination, with a harness for a fire-engine or like apparatus, of a device for suspending said harness above the place occupied by the horse when attached to the apparatus, substantially as and for the purpose set forth."

The defences interposed are, first, the claim is void for the reason that there is an attempt to patent a mere abstraction—the idea of suspending a harness from the ceiling in a particular place. Second, the defendants do not infringe, if the claim is confined to the particular mechanism described in the specification. Third, the patentee was not the original inventor.

So far as the records of the Patent Office show, Sullivan was the first to enter this field of invention. No other patent, American or foreign, is introduced to anticipate or limit the claim referred to. It should, therefore, be construed broadly,

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to cover any similar apparatus which suspends a harness in substantially the same manner.

The details of construction, both in the harness and the suspending apparatus, are non-essentials, inferior and subordinate to the principle embodied in the patent, which is the paramount and superior consideration. The man who first conceived the idea of suspending the harness above the horse, and put it into successful and practical operation, is the one who conferred the benefit and is entitled to the reward. It would be an exceedingly illiberal and narrow construction to hold that he should be deprived of the fruits of his ingenuity by one who simply changed the form of the harness or of the device by which it is suspended. No principle is better settled than that a mere abstract idea is not the subject of a patent; but that principle has little application here, for the reason that the inventor has put his idea into tangible shape and given it form and substance. For years the problem was how to get the engine to the scene of the fire in the shortest possible time. By a combination of old devices Sullivan has reduced time to the minimum, and accomplished a confessedly beneficial result. It is not an abstraction he seeks to secure, but the apparatus by which the idea is carried out.

With the claim thus construed, and in view of the state of the art, very little need be said upon the question of infringement. The defendants have adopted an analogous combination. The harness and hoisting apparatus used by them are substantially the same as those described in the patent. They have, quite likely, introduced some improvements; they have employed the well known mechanical equivalent of a pulley and weight for a coiled spring; they suspend the whole harness and attach no part of it to the pole, and there are minor points of difference between the two mechanisms, but, in all essential particulars, they are alike.

The main effort on the part of the defendants has been to show that Sullivan was not the original inventor. Here, the burden is upon them, to satisfy the Court beyond a reasonable

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doubt. A mere preponderance of evidence is not enough; the proof must be of such a convincing character that the Court can say, without hesitancy, that the allegations of the answer in that behalf are true. Has such proof been offered? It is thought not. A fair conclusion to draw from the evidence is, that the defendants have succeeded only in casting doubt upon the title of the patentee. Instead of capturing the citadel they have simply made a breach. True it is, that before the patent vague conceptions of the invention had entered other minds; true it is that others had approximated more or less closely to the successful realization. No one had quite reached the goal.

The evidence shows that in one instance, while the horse was standing harnessed in the stall, the collar was, by means of a cord, pulley and weight, raised on his neck to prevent chafing, heat and irritation. In another case, a single harness, without collar and hames, was attached to the thills of a light fire wagon. The harness and thills were elevated to the ceiling by a rope, pulley and weight. A similar method was, at another time, applied to the harness of hose carts, excepting that the collar and hames were left on the horse.

There was also evidence tending to show, that, in 1872, at Louisville, the harness of a hose cart was suspended by a rope and pulley from the ceiling, and that the collar was hinged, and fastened by a snap or spring lock at the bottom. No witness was called who recollected seeing a harness for fire-engines suspended prior to the date of the patent.

But, if not discredited, the evidence relating to the Louisville apparatus would certainly have the effect of restricting the claim within exceedingly narrow limits. The complainants have, however, succeeded in showing that there may well be a mistake both as to the time when, and the manner in which, the harness was suspended at Louisville. The chief and assistant-chief of the fire department of that city during the year 1872, never saw or heard of the apparatus described by the defendants' witnesses. The chief next in succession, who, previous to his elevation to that office, had been in

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and about the engine houses for twenty years, gave like evidence. A member of the Cleveland fire department, who came to Louisville in 1879, for the purpose of explaining and introducing the Sullivan apparatus, testified that he visited the different engine houses but saw nothing at all resembling a swinging harness. The Louisville firemen were surprised and pleased with the invention, and it was immediately adopted by them.

It must, therefore, be said, within the rule heretofore adverted to, that the defendants have not succeeded in establishing their defence.

There should be a decree for an injunction and account, with costs.

M. D. Leggett and John Crowell, for the plaintiffs.

Giles E. Stilwell, for the defendants.

 HENRY HEUSER

vs.

THE CONTINENTAL LIFE INSURANCE COMPANY.

A life insurance company passed the following vote, February 6th, 1871: "Voted, that a dividend from the surplus of the company, of 50 *per cent.* upon life policies entitled to participate in the profits, which were issued prior to January 1, 1869, and of 40 *per cent.* upon endowment policies of the same year, be declared and made payable in accordance with the rules of the company, upon premiums paid in 1868, when renewed previous to January 1st, 1873." The word "renewed," in this vote, is not limited to policies which were renewed or prevented from forfeiture by the payment of a premium, but includes participating, limited-payment policies which had been prevented from forfeiture prior to January 1st, 1873.

(Before SHIPMAN, J., Connecticut, May 12th, 1884.)

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SHIPMAN, J. This is an action at law, which was tried by the Court, the parties having, by a duly signed written stipulation, waived a trial by jury. The facts which are found to have been proved and to be true, are the following: On April 4th, 1867, in consideration, among other things, of the annual premium of \$386 90, in hand paid and to be paid, to the defendant, by Susan Heuser, the wife of the plaintiff, on or before the 4th day of April in each and every year during the term of fifteen years, the defendant, a life insurance company, duly incorporated and located in Hartford, Connecticut, made its policy of insurance in writing, and thereby assured the life of the plaintiff, now of Syracuse, New York, in the amount of \$5,000. In and by said policy of insurance, it was agreed, that if, after the receipt by said company of not less than two annual premiums, default should be made in the payment of any subsequent premium, said policy should then be binding on said company, for as many fifteenth parts of the sum originally insured as there should have been complete annual premiums paid, without subjecting the assured to any subsequent charge, and that, if the plaintiff should survive until April 4th, 1882, the amount insured should be paid to him, deducting therefrom all his indebtedness to the company, if any, then existing. Five consecutive annual premiums were paid by Susan Heuser to the defendant, upon said policy. Said payments of premiums ceased on April 4th, 1871. On April 4th, 1882, Henry Heuser was and still is living. One-half of each annual premium was paid in cash, and one-half was paid by note of Henry Heuser, the interest being paid in advance. On April 4th, 1882, the defendant held and still holds four of said notes, each for \$193 45, and dated on April 4th, in the years 1867, 1868, 1869, and 1870, respectively, each payable twelve months after date, to the order of the defendant, with interest, and each having been given for one-half of the premiums which were payable at the respective dates of said notes. On the first note the following endorsement had been made, dated April 4th, 1872: "Received on the within note one hundred and thirty-five $\frac{1}{4}$ dollars, divi-

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dend." On the second note the same endorsement had been made, dated April 4th, 1873. On the third note the following endorsement had been made, dated April 4th, 1874: "Received on the within note thirty $\frac{1}{10}$ dollars dividend." Each one of said endorsements was, in 1880, erased, by lines drawn through them respectively, by the secretary of the company, who also added the words "Error—no dividend." This was done with the knowledge and approval of the directors. These endorsements were made by the direction or under the instructions of the president or secretary of the company, in the usual course of business, and, as was supposed, by authority of the following votes of the directors of said company, the first having been passed February 6th, 1871, the second, February 19th, 1872, and the third, December 2d, 1873: "Voted, that a dividend from the surplus of the company, of 50 *per cent.* upon life policies entitled to participate in the profits, which were issued prior to January 1, 1869, and of 40 *per cent.* upon endowment policies of the same year, be declared and made payable, in accordance with the rules of the company, upon premiums paid in 1868, when renewed previous to January 1st, 1873." "Voted, that a dividend from the surplus of the company, of 50 *per cent.* upon life policies entitled to participate in the profits, which were issued prior to January 1, 1870, and of 40 *per cent.* upon endowment policies of the same year, be declared and made payable, in accordance with the rules of the company, upon premiums paid in 1869, when renewed previous to January 1st, 1874." "Voted, that a dividend be, and hereby is declared to those policy holders entitled to participate in the profits of the company, payable January 1st, next, and thereafter during the year ending December 31st, 1874, as the several policies may be renewed, in accordance with the contribution of each to the surplus, using the following assumptions." Endorsements like those made upon the notes in question were made, when the interest was paid and not otherwise, upon all premium notes upon this class of endowment, non-forfeitable, participating policies, which had lapsed in part, but which were

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existing policies at the time the endorsements were made, and which in other respects were included within the provisions of said respective votes. If the interest was not paid upon a note, no endorsement was made. About 40 *per cent.* of such notes received the endorsement in 1872 and in 1873, and a much less proportion in 1874. There was no difference in the policies pertaining to the notes which received and which did not receive the endorsement, except that, in the former case, the interest had been paid upon the notes, and in the latter it had not been paid. Similar erasures were made by the secretary after the year 1880, upon all similarly endorsed premium notes belonging to this class of policies, when the policies upon which the notes were given matured and became payable.

The following statement* was contained in the prospectus of the defendant which was prepared by the secretary of the company in 1868, and was circulated among the agents and policy holders: "On all participating policies, dividends will be paid annually, commencing four years after the payment of the first premium; although, when credit is given for part of the premium, they are practically available in advance, lessening each annual payment. They will be paid in cash, when the full premium is paid in cash, or applied to cancel the notes of those who elect to have credit for one-half; and, in the settlement of a policy, a dividend will be allowed on each premium which has been in possession of the company for a full year, and on which no dividend has been paid. Dividends based upon the rates paid will cease when they equal the payments in number; if based on the ordinary life rate, they will continue during life, and if on the annual endowment rate, during the existence of the policy. If the annual premiums on limited-payment policies are discontinued before the specified number have been paid, the dividends thereafter will be based on the continued rate for the same kind of insurance, and will continue until the number of dividends equals the number of annual premiums paid." The first of said paragraphs was repeated in another circular which

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was prepared by the company for distribution and was circulated. The dividends of 1872 and 1873 were computed according to the rule stated in the first part of the third paragraph. These three paragraphs contained the company's regulations or rules prescribed for the management of dividends, and the practice of the company continued to be in accordance therewith, at least until 1876. The amount of dividends which were paid during the years 1872, 1873 and 1874, and which included the endorsements in question, was annually reported to the stockholders of the company. It is admitted that one other and subsequent dividend, of \$31 20, was properly endorsed upon the fourth note. The interest upon the amount of the notes as they were diminished by all said endorsements was demanded by the secretary after said erasure, the circular stating the amount of the notes to be \$440 86, and was paid to April 4th, 1882. This fact is not material upon the construction of the said three votes, and was not admitted for that purpose.

The only question in the case is, whether the amount of the three erased endorsements should be deducted from the amount claimed by the defendant to have been due upon said notes on April 4th, 1882. This question depends upon the construction to be given to the word "renewed," in the three votes which have been quoted. For example, in the vote of February, 1871, the dividend is declared upon premiums paid in 1868, when the policies are "renewed" previous to January 1st, 1873. The defendant says that this language can refer only to policies which are renewed or prevented from forfeiture by the payment of a premium, and, as a non-forfeitable endowment policy which had lapsed *pro rata*, but which was a paid-up policy for a portion of the amount originally assured, was not continued in force or prevented from forfeiture by the payment of an annual premium, the word "renewed" did not apply to such a policy.

The plaintiff insists that no such literal meaning is to be given to the language, but that the vote is to be construed in harmony with the contemporaneous written rules of

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the company, and that the contemporaneous acts of the company in accordance with the rules should have an influence in determining what was meant by the votes.

It certainly appears, from the printed prospectus, that a dividend was promised to be allowed in the settlement of a policy upon each premium which had been in the possession of the company for a year, and that, notwithstanding annual premiums on limited-payment policies had been discontinued before the specified number had been paid, it was understood that dividends thereafter, based on the continued rate for that kind of insurance, would continue until the number of dividends equalled the number of annual premiums paid. This rule declares the intended practice of the company. If the vote is to be construed as confined to policies which are prevented from forfeiture by the prompt payment of an annual premium, such a construction would not be in harmony with the rule of the company, and would, also, be contrary to its uniform practice when the interest upon the premium notes had been paid. Annual dividends were declared in accordance with the rule, and the officers showed, by their acts, that the intent of the votes was to make the dividends applicable to this policy and to all others in like circumstances. The attempt of the company, in erasing these endorsements, was to place, in 1880, for its own advantage, a limited meaning upon the language of the votes of 1871, 1872 and 1873, when such meaning was at variance with the contemporaneous written rules and with the contemporaneous acts of the company. The office of a "renewal," as it is termed, of a life policy, is to prevent discontinuance or forfeiture, and, by the word "renewed," the respective votes meant to include, and did include, participating limited-payment policies which had been prevented from forfeiture prior to the dates respectively mentioned.

Let judgment be entered for the plaintiff, for \$1,225 80, with interest from April 4th, 1882.

Charles J. Cole, for the plaintiff.

Charles E. Perkins, for the defendant.

Jones, Lamson & Co. v. The Steam Stone Cutter Company.

JONES, LAMSON & Co.

vs.

THE STEAM STONE CUTTER COMPANY.

In a suit for betterments, under section 1,260 of the Revised Laws of Vermont, the plaintiff must have purchased the land "supposing the title to be good in fee," and is not entitled to recover if he purchased subject to a lien, of which he knew, and which he did not suppose to be invalid, and from which he supposed his grantor could and would relieve the land.

(Before WHEELER, J., Vermont, May 29th, 1884.)

WHEELER, J. This is a declaration for betterments, filed according to the statutes of the State, after judgment in ejectment in favor of this defendant against the plaintiffs, at last term. (*Rev. Laws Vt., sec. 1,261.*) The issue has been heard by the Court upon the waiver of a jury, and involves the right to maintain the declaration, which is the chief matter in controversy. The right to maintain the action depends wholly upon the statutes of the State. (*Griswold v. Bragg*, 18 *Blatchf. C. C. R.*, 202.) These statutes give the right to the defendant in ejectment against whom a recovery has been had, to recover of the plaintiff the value of improvements made by the defendant, or those under whom he claims, upon the land, if he has, or they have, purchased the lands, "supposing the title to be good in fee." (*Rev. Laws Vt., sec. 1,260.*) These plaintiffs purchased the lands of the Windsor Manufacturing Company. They were subject to a lien in the nature of an attachment, held by this Court to be valid, and upon which the recovery in ejectment has been had. (*Steam Stone Cutter Co. v. Sears*, 20 *Blatchf. C. C. R.*, 23; *Steam Stone Cutter Co. v. Jones*, 21 *Id.*, 138.) These plaintiffs knew, at the time of their purchase, of this attachment. It was mentioned as an incumbrance, and covenanted against, in their deed. They testify that they supposed the Windsor Manufacturing

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Company would make the title good, and do not testify that they supposed the attachment was invalid. It seems quite clear, upon the evidence, that they relied upon the covenant of their grantor, and the ability of the grantor to relieve the property from the attachment, either by defeating the suit in which the attachment was made, or by satisfying the judgment if one should be recovered, rather than the title of their grantor, as against the attachment. They purchased supposing the title to be subject to the attachment, instead of supposing it to be good in fee, as the statute requires, to entitle them to maintain this claim. They do not lose the land by the failure of a title which they supposed to be good, but by the failure of the Windsor Manufacturing Company to keep good a title which they knew was liable to turn out to be bad. This is a rule of property to be governed by the laws of the State, but the decisions of the Courts of the State most favorable to, and most relied upon to support, the claims of these plaintiffs, only give countenance to recoveries for betterments made under a title supposed to be good in itself. (*Brown v. Storm*, 4 *Vt.*, 37; *Whitney v. Richardson*, 31 *Vt.*, 300.) The faith which these statutes vindicate must rest upon the title and its inherent strength to withstand attack, and not upon covenants or other undertakings to maintain. The result is, there must be judgment for this defendant, upon this declaration. These plaintiffs will have left to them, apparently, all the remedies which they supposed they had against the Windsor Manufacturing Company. If those remedies fail of substantial result for want of pecuniary responsibility of that company, these plaintiffs, and not these defendants, trusted to that responsibility in this respect, and it is more just that they should stand the loss.

There must be a judgment for the defendant on the declaration for betterments, with costs.

William Batchelder, for the plaintiffs.

Aldace F. Walker, for the defendant.

The Albany Steam Trap Company v. Felthousen.

THE ALBANY STEAM TRAP COMPANY

vs.

BARENT W. FELTHOUSEN AND OTHERS. IN EQUITY.

Claims 1 and 3 of letters patent granted to Helem Merrill, April 30th, 1867, for an improvement in steam-heating apparatus, namely, "1. The retaining of the water in the receiving and discharging cylinders until, at required heights, it exerts a power sufficient to perform the operations substantially as described and set forth." "3. I claim the method of returning the water of condensation to the boiler, substantially as described," must be construed as claims for the apparatus which performs the functions mentioned in the first claim, and which is the means for effecting the method specified in the first claim.

On the construction given to all the claims of the patent, the defendants were held not to infringe.

Re-issued letters patent, No. 5,549, granted to James H. Blessing and Frederick Townsend, as assignees of James H. Blessing, August 26th, 1873, for an improvement in steam-traps, the original patent, No. 173,670 having been granted February 18th, 1872, are, as to claim 1, void for want of patentable invention, and, as to claim 5, not infringed.

Re-issued letters patent, No. 8,286, granted to the Albany Steam Trap Company, as assignees of James H. Blessing, June 18th, 1878, for an improvement in steam-traps, the original patent, No. 142,323, having been granted September 2d, 1873, are not infringed.

Letters patent, No. 207,484, granted to James H. Blessing, August 27th, 1878, for an improvement in steam-traps, are valid and are infringed.

As the plaintiff succeeded on only one of the four patents sued on, costs were not allowed to it.

(Before WALLACE and COXE, JJ., Northern District of New York, May 31st, 1884.)

WALLACE, J. The first of the four patents in controversy was granted to Helem Merrill, April 30th, 1867, and the specific improvement in steam-heating apparatus which it describes consists in the devices for returning the water of condensation back into the boiler. The main contention of the parties is respecting the construction which should be placed

upon the claims, especially upon the first and third claims of the patent, it being conceded by the experts for the defendant that the claims have not been anticipated by any of the earlier patents introduced in evidence by the defendant, if the claims are limited so as to restrict the patent to the specific devices of the description.

The description of the patent is as follows: "My improvement consists in the manner of returning the water of condensation back into the steam-boiler or generator, when the heaters, evaporators or condensers are above or below the water level in the boiler, thus keeping the coils and return pipes free from water. The steam being dry, imparts more heat for the purposes required, thereby causing a great economy in fuel. To enable others skilled in the art to make and use my invention, I will proceed to describe its construction. Figure 1 is a front view of a steam-boiler with a receiving and discharging cylinder, also a heater above and one below the water-level in the boiler, together with the necessary pipes and valves. Figure 2 is an enlarged vertical section of one of the cylinders and float, as attached to the steam or water cock. Figure 3 is a cross section of a cylinder, float, and arm. Figure 4 is a vertical section of one of the check valves. The letters of reference show corresponding parts in the different figures represented in the corresponding drawings. Steam is generated in boiler A, fig. 1. The air cocks, *g, g*, fig. 1, receiving cylinder G, and discharging cylinder H, fig. 1, are opened. The steam is let into the main pipe C, through the stop-valve B, and into the coil D, which is above the water-level, as indicated by red line *i*, and also into coil E, which is below the water-line, through the cocks *h, h*, all in fig. 1. As the steam is condensed in the coils by the process of heating or evaporating, the water of condensation passes down into and through the condensing-pipe F, into cylinder G, fig. 1. When all the air is exhausted through cock *g*, it is closed, and the water rises, carrying up the float *a'*, fig. 2, until it strikes the arm *o'*, fig. 2, and carries it up with the rod and arm *b*, figs. 2 and 3, which are connected together through a stuffing-

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box on the outer side of the cylinder. The connecting-rod *c'* is attached by a loose joint to the arm *b*, fig. 2. The other end of the rod *c'* has a slot that moves on a pin on the side of the ball-arm P. When the float raises the arm *b*, fig. 1, it brings the end of the slot in contact with the pin, and throws the ball P past the centre, when it falls by its own weight, being loose on the pin which projects from the head of the key of the cock N, fig. 1. The quadrant, which is attached firmly to the key of the cock, has two points projecting outward, against which the shaft holding the ball strikes, in its fall, and carries the quadrant round, thereby opening the water cock N, fig. 1, allowing the water to flow from cylinder G, through pipe J, and check-valve I and pipe K, into discharging-cylinder H, fig. 1. The air-cock *g*, in cylinder H, being still open, there is no pressure on the top of the water, which rises, carrying the float and arms, as before described in fig. 2, until it is near the top, when the air-cock *g* is closed, and, the float having raised the inner end of the arm *b*, fig. 1, it carries the outer end down, by the shaft in the stuffing-box being the axis, until it has drawn the ball-arm P down by means of the connecting-rod *c'*, fig. 1. Thus throwing the ball past the centre, it falls and operates as before described for receiving-cylinder G, fig. 1. The ball P, in falling, moves the quadrant attached to the key of the cock O, admits the steam from the boiler A, through pipe K, into the cylinder H, on top of the water, which being above the level, and, by the pressure of the steam on its surface, causes it to flow downward by its own gravity, through pipe K, up through valve L, pipe M and cock *e'*, into the boiler A, fig. 1. When the water is nearly all out of cylinder H, the float, having fallen, closes the steam cock O, by means of the lever, connecting-rod and ball-arm. By reversing the ball, it stops the steam from entering the cylinder H, fig. 1. The cylinder G, having discharged its water into the cylinder H, the float has fallen and closed the cock N in the same manner as described for the steam-cock O. While the water is again filling the cylinder G, the steam is being condensed in the cylinder H, thus reducing the pressure, so that, when the

water again rises sufficiently to open the cock N, it rushes up, as before described, to fill the vacuum caused by the steam being condensed in the cylinder H. The pressure on the top of the water in the cylinder G also forces it up, thereby making the operation sure, the cylinders receiving and discharging alternately, as described. The cock *f*, fig. 1, at the bottom of the cylinder G, is for drawing off the water when the whole apparatus is not in operation. The float *a'*, fig. 2, has a tube through its centre, and is air-tight. The rod which holds the float in the centre of the cylinder passes through the tube, the float thereby being independent of the levers until they come in contact by the rising or falling of the water. One or more coils or heaters may be used at the same time. If motive power is required from the same boiler, a separate pipe should be used for that purpose." The claims are as follows: "1. The retaining of the water in the receiving and discharging-cylinders until, at required heights, it exerts a power sufficient to perform the operations substantially as described and set forth. 2. The independent float, as connected and combined with the stop-cocks, making the whole apparatus self-acting, for the purposes substantially as set forth and described. 3. I claim the method of returning the water of condensation to the boiler, substantially as described."

Upon the face of the claims grave doubt is entertained whether the first and third claims are not nugatory, because they do not particularly specify and point out the part, improvement or combination which the inventor claims as his invention. The first claim is so vague and nebulous that it does not convey any definite meaning. The third is so general that it is, in effect, the mere statement of the inventor that he claims what he has described in his specification. The first is a claim for the functions of some part of the apparatus described, whereby the water is retained, and enabled to perform certain operations by reason of being retained, in the receiving and discharging cylinders; but what these operations are, and what devices co-operate thereto, is left open to conflicting theories. Both of these claims must be construed as

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claims for the apparatus which performs the functions mentioned in the first claim, and which is the means for effecting the method specified in the third claim; otherwise, both claims are void, as being for a function, or abstract effect, instead of the means by which it is produced. If the claims were for some of the specific devices employed, either separately or in combination, or, if the description distinguished what was new from what was old in the state of the art, the scope and limits of the invention might be intelligently ascertained.

Referring to the prior state of the art, to ascertain what Merrill really invented, it appears that he was not the first to effect a return of the water of condensation to the boiler, when the heating surfaces in a steam-heating system were located above or below, or above and below, the water-level of the boiler. The English patent of July 8th, 1857, to Bonsfield, and the United States patent of March 2d, 1858, to Dennison and Sealy, show all the features of the closed pressure steam-heating system of Merrill, except the receiving chamber, and the automatic valve operating mechanism in that chamber and in the discharge chamber. The United States patent to Barnes, of September 6th, 1859, shows a closed pressure steam-heating system, in which the heating surfaces are located both above and below the level of the water. This system contains a receiving chamber located below the level of the boiler, to receive the water of condensation, and a discharge chamber located above the level of the boiler. The chambers are connected, and the receiving chamber empties the water into the discharge chamber, and the discharge chamber empties it into the boiler. The pipe by which steam passes from the boiler into the discharge chamber, and the pipe by which the water flows back from that chamber into the boiler, are provided with a stop-cock or valve, to close or open the passage, which is operated by hand. The system contains all the features of Merrill's, except the automatic valve mechanism, the valves in this system being operated by hand.

The automatic valve devices of Merrill were old in principle. An automatic steam-boiler feeder, consisting of a vessel interposed between the boiler and a water reservoir, and fitted with valves and a float, so applied as to cause the said vessel to be alternately filled from the reservoir and discharged into the boiler, is disclaimed as old, in the patent to James Hoover, of August 6th, 1861. That patent describes automatic valve devices in the feeding vessel, which operate upon the same principle as Merrill's, to do the same work. The English patents to Routledge, of June 25th, 1860, and Auld, of April 21st, 1859, also describe a float and tumble-bob devices for actuating equalizing valves in steam-boiler feeding apparatus.

What Merrill did was to introduce the automatic valve devices shown in these patents, with modifications, into the receiving and discharging chambers of the Barnes patent. By doing this, he effected an automatic return of the water to the boiler, a new result and a valuable one in a steam-heating system of the kind to which his invention relates. If he had claimed a method of returning the water by means of his new combination, pointing out the co-operative members, there would be nothing to impeach his claim. The difficulty of the complainant's case is to give any construction to the claims of the patent that will save the invention. For present purposes, it is only necessary to construe the patent so far as to decide the precise point of difference between the experts as to the proper construction of the claims. As to the first and third claims, the question is, whether they must be confined to a combination of devices of which the valve operating mechanism of the lower cylinder or receiving chamber is a constituent. If they are to be limited to such a construction, the defendant does not infringe, as he employs merely an ordinary trap for his receiving vessel, without any automatic valve mechanism. It is insisted, for the complainant, that the only function of the receiving chamber is to receive and store the water for delivery into the discharging chamber, and, therefore, that this valve mechanism in the receiving chamber is

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not an essential element in the system. Undoubtedly, the automatic return of the water of condensation can be effected successfully if the receiving chamber is merely a trap located below the level of the lowest heating surface. But, how can this be ascertained from the claims and description of the patent? Not only does the description locate the automatic valve mechanism in the receiving chamber, but its operations there are pointed out with particularity. According to the theory of the specification, the automatic mechanism in that chamber regulates the supply of the discharge chamber, by emptying the water at intervals determined by the action of the float. The water is to be retained in the receiving chamber until it is full, and there is a fixed point which it must reach before it can actuate the valve mechanism and escape into the discharge chamber. It seems very plain, that the automatic valve mechanism in the receiving chamber cannot be eliminated from the invention described, and must be regarded as of the substance of the invention claimed. The second claim of the patent must also be limited to such a float, in general detail of construction, as is described in the specification, or the claim is anticipated by the independent float shown in the patent of Hoover, and the other references cited. The defendants do not employ such a float.

As to all the claims of this patent the conclusion is, therefore, reached, that the defendants do not infringe.

COXE, J., concurs.

COXE, J. This is an equity action founded upon four patents for improvements in steam-heating and steam-traps. The first was issued to Helem Merrill, April 30th, 1867. The other three, known as the Blessing patents, were issued as follows: the first, No. 123,670, February 13th, 1872, re-issued as No. 5,549, August 26th, 1873; the second, No. 142,323, September 2d, 1873, re-issued as No. 8,286, June 18th, 1878; the third, No. 207,484, August 27th, 1878.

The Blessing patents alone remain to be considered, it

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having been determined, for reasons stated in the opinion of the Circuit Judge, that the defendant does not infringe the claims of the Merrill patent. The object of the inventor in each of these patents was, as in the Merrill patent, to return the waters of condensation automatically to the boiler, to accomplish the same result upon similar principles, but by different and improved mechanism. In view of the prior state of the art and of the construction given to the Merrill or foundation patent, it may be said, at the outset, that the claims now to be examined should be confined within exceedingly narrow limits. Each inventor must be restricted to the specific improvement and the particular device described and claimed by him.

Regarding the first Blessing patent, the controversy is limited to the first and fifth claims. They are as follows: "1. A receiving and discharging vessel, C, communicating with a steam-boiler by means of a steam-pipe, G', and inlet-check valve, *z*, and with the same boiler by means of an outlet-pipe, J, and a valve, 2, and so arranged between or in respect to the two valves, that the water is received and allowed to fall to the bottom of the vessel, and the steam following is not compelled to pass through the water, all for the purpose of automatically returning water of condensation to the said boiler from steam-heaters, substantially as described." "5. A receiving vessel, C, for the purpose of insuring the return of the water of condensation to the boiler, which rises and falls on occasions, combined with a steam-heater and a steam-boiler, substantially as set forth."

As to the first claim, the conclusion is reached, that nothing valuable is there described, which was not known before, and, as to the fifth, that the defendant does not infringe. The points of difference suggested by the complainant between the apparatuses in this and the Merrill patent are these: In the latter the inlet and outlet passages to and from the trap are combined in one. In the former the inlet is at the top and the outlet at the bottom. In the former, too, the weight of the water is used to operate the equalizing steam-

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valve, the receiving vessel being counterbalanced by a weight combined with a lever. In the Merrill patent an air-tight float rises and falls with the water in each cylinder. With these exceptions, the principles of the two patents are substantially identical.

Regarding the first claim, it is unnecessary to repeat what is so well stated by Judge Wallace, or to refer in detail to the numerous references which have been so extensively commented upon by the experts and by counsel. It suffices to say, that the patentee has, in view of what was before known in the art, done nothing to entitle him to a monopoly. It is, perhaps, true, that the precise apparatus is not described in any prior patent, but every separate element was known, and the mechanical change necessary to transform several of the devices referred to into the receiving and discharging vessel communicating with a steam-boiler, as described in the claim, would hardly amount to invention.

The fifth claim refers to a receiving vessel, counterbalanced by a weight, in such a manner that the vessel will rise when the water is withdrawn and sink when it is filled again. In the defendants' device the trap is stationary, and the float is caused to rise by what is termed "a water counterbalance;" that is, the water is introduced into the trap, and the float, being empty, rises until the water, overflowing into it, causes it to sink. It is contended that this is the mechanical equivalent for the metal weight described. We cannot accede to this view. Indeed, the inquiry is suggested, why did the inventor, if he considered the one an equivalent for the other, describe and claim the equivalent so carefully in the second patent. To use the language of the complainant's brief, the second patent shows "Mr. Blessing's first modification of the invention described in Exhibit First Blessing Patent, and it consists simply in the substitution, for the weight, W, of a water counterbalance." The method of operation in the defendants' and complainant's apparatuses is, in practice, entirely dissimilar, and, where the field of invention is so thor-

oughly occupied as we find it here, each patentee must be contented with the mechanism described by him.

The second Blessing patent contains the following claims :
“ 1. A steam-trap provided with a rising and falling bucket contained within a shell, into which the return-water is delivered, and from which it is discharged by a siphon-pipe which passes nearly to the bottom of said bucket, substantially as described. 2. A steam-trap provided with a rising and a falling bucket contained within a shell, into which the water is delivered, and from which it is discharged by a siphon-pipe passing nearly to the bottom of the apparatus, the said bucket being attached to apparatus operating the steam-valve, which apparatus does not open or close the steam-valve at the commencement of the fall or rise of the bucket, but allows an interval of time to elapse between the movement of the bucket and its action on the steam-valve, whereby the bucket is entirely filled and discharged, substantially as described. 3. An improved steam-trap, provided with a rising and a falling bucket, through the top of which the water is delivered and discharged by means of a delivery and discharge pipe, each provided with a check-valve, substantially as described. 4. An improved steam-trap, provided with a rising and falling floating bucket, into which the water is delivered, and through which it is discharged, by means of a siphon-pipe reaching nearly to its bottom, and provided with an air-cock, by means of which the accumulated air may be discharged from the apparatus, substantially as described. 5. The inlet and outlet passages, *b b'*, provided with check-valves, and combined with a water receiver containing a vertically movable bucket, *T*, into which the water enters, and from which it is discharged, substantially as and for the purposes described.” They all relate to an open top float contained within a shell constructed with a siphon-pipe, so that the water is discharged from the top instead of the bottom of the float. The water from the coils is, by means of a pipe, forced directly into the float, which, when a sufficient quantity has been introduced, is thus caused to sink.

In the defendants' trap, the water is showered down from the perforated diaphragm to the bottom of the containing shell. As the water flows into the trap, it causes the float, which is empty, to rise until it comes in contact with a plate at the top of the trap, where it remains until the circumjacent water flows over its edge, and, when the trap and float are filled, the latter sinks to the bottom of the former. It is insisted that this difference is immaterial, though the complainant's expert admits that, "perhaps, it is an improvement to deliver the water outside of the bucket." It certainly is an improvement, and one to which the defendant would be entitled, provided he first made the discovery. Step by step has the advance in steam-traps been made, each inventor adding something, until, at the present time, perfection has been nearly reached. The progress made by Blessing, as shown in this patent, since the several devices which preceded it, is surely no more beneficial and important than that made since the patent, as illustrated by the defendants' trap and the third Blessing trap.

The claims of the third Blessing patent are as follows: "1. An automatic steam-trap, for the purpose of returning water to the boiler, having an open-top float, into which water enters and whence it is delivered to the boiler, thereby causing said open-top float to rise and fall, when the said open-top float is connected to an equalizing steam-valve, by a connecting apparatus, which does not connect a steam-space and the atmosphere, nor two steam spaces of different pressures, and when the opening and closing of the steam-valves is not effected gradually, but suddenly and surely, by reason of the fact that there is a certain amount of lost motion between the movement of the open-top float and its action on the valve. 2. An automatic steam-trap, consisting of a containing-vessel and a rising and falling open-top float, when the water which enters said trap first fills the space between the open-top float and the containing-vessel, and when the equalizing steam-valve is not immediately actuated by the movement of the open-top float, but the open-top float is connected

to said steam-valve by means of apparatus allowing a certain amount of lost motion, substantially as described. 3. An automatic steam-trap, which consists of an inclosing-vessel, A, and a rising and falling open-top float, B, when the inclosing-vessel is provided with a tank communicating with its upper portion, substantially as described. 4. An automatic steam-trap, having a vessel, A, provided with a tank, T, connecting with its upper portion, which tank communicates with the vessel by means of two or more small openings, thereby delaying the escape of the water in the tank into the inclosed vessel, substantially as described. 5. An automatic steam-trap, for returning water to the boiler, provided with a rising and a falling vessel, and with apparatus, substantially as described, independent of the mere inflow of water from the supply, whereby the water-level between the rising and falling vessel and the containing-casing is maintained and raised, after the vessel begins to ascend. 6. The combination of the vessel, A, open-top float, B, and rod, *p*, provided with collars, *g* and *f*, operating the steam-valve, *t*, when the collars *g* and *f* are separated for the purpose of allowing a certain amount of lost motion before opening or closing the valve, substantially as described. 7. In an automatic steam-trap for returning water to the boiler, the combination of the shell, A, with a siphon, C and C', provided with the air-cock, *x*, for the purpose of filling said siphon, substantially as described. 8. An automatic steam-trap, provided with the tank, T, connecting with the upper part of said trap, by means of apertures, *m n*, and operating the steam-valve by means of apparatus substantially as described, whereby a certain amount of lost motion is allowed between the rising and falling open-float and the equalizing steam-valve, substantially as described."

It will be observed, that the trap here described is almost the exact counterpart of the defendants'. In principle and operation the two are substantially alike, and we have no hesitancy in saying that the defendants infringe. The main controversy, therefore, has reference to the alleged anticipation by the defendant, who asserts that he is the prior in-

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ventor. Upon this issue, the burden is upon him, and he has failed to prove to our satisfaction the allegations of the answer in this behalf. The evidence relied on to establish prior use is vague, shadowy and uncertain. No part of the trap which, as is alleged, anticipated complainant's invention, is produced, and there is nothing definite as to the manner of its construction. Opposed to the defendant's testimony is the positive statement of Blessing, that he conceived his invention in the spring of 1874, though it was not perfected till the spring of 1875. In corroboration of this statement, the patterns are produced, and the pattern maker identifies them as having been made by him in the months of February, March and April, 1874. Our conviction is that the defendant has not succeeded in proving a defence.

There should, therefore, be a decree for the complainant upon the third Blessing patent. As the complainant has been defeated upon three of the four patents in suit, the decree will not allow costs.

WALLACE, J., concurs.

Dickerson & Dickerson, for the plaintiff.

George B. Goodwin and *J. D. F. Stone*, for the defendants.

The New York Grape Sugar Company v. The Buffalo Grape Sugar Company.

THE NEW YORK GRAPE SUGAR COMPANY

vs.

THE BUFFALO GRAPE SUGAR COMPANY AND OTHERS. IN
EQUITY.

THE SAME

vs.

THE AMERICAN GRAPE SUGAR COMPANY AND OTHERS. IN
EQUITY.

An assignee of a patent, having obtained a decision in his favor, in a suit in equity for infringement, moved, before the signing of an interlocutory decree, to amend the bill by averring that the assignment conveyed the right to recover profits and damages for prior infringements, and by praying an accounting for the same. It appearing that the litigation had been conducted on both sides in that view, the motion was granted, without prejudice to the question as to whether the decree should provide for such accounting.

(Before SHIPMAN, J., Northern District of New York, June 2d, 1884.)

SHIPMAN, J. In these cases, the plaintiff moved, before the signature of the interlocutory decree, (21 *Blatchf. C. C. R.*, 519,) to amend each bill by the insertion of averments, that the assignments of the letters patent which are the subject of the respective bills, also conveyed to the plaintiff and present owner the right of recovery for prior infringements of said letters, both in regard to profits and damages, during the previous life of the patents, and by the insertion of a prayer for an accounting for the infringement by the defendants of the letters patent, from the date of the issuing of them severally, and for the violation of the rights of the mesne assignors and of each of them. The motion has been argued solely

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upon the propriety of allowing the amendments, and not upon the effect of the allowance, if made, upon the decrees.

The counsel for the plaintiff asks for the amendments upon this ground: He admits that, as a general rule, an amendment which changes the character of the bill, or which introduces a new cause of action, ought not to be allowed, especially after the bill has been heard, (*The Tremolo Patent*, 23 Wall., 518;) but he says that these bills were brought not only for an injunction and for an accounting in respect to the amount which the plaintiff, as an owner of the patent, should recover, but to recover the assigned claims for damages and profits; that the plaintiff supposed that the averments were sufficient; that all the equitable objections to a recovery for infringements prior to the plaintiff's purchase were set up in the answer; and that the defendants knew that a recovery upon the assigned claims was brought.

I think that these positions are true. In view of the history of the case, it is not possible that the plaintiff brought its bills without intending to include, and supposing that it had included, the subject of the assigned claims for the damages and profits which were due to the mesne assignors, although I am clearly of opinion that the averments of the bills did not include such claims. It is, also, true, that the defendants knew that a recovery for such claims was brought and defended against them.

Under these circumstances, I think that, the allowance of the amendments being within the power of the Court, it is its duty to allow them, and that to refuse the allowance would be an improper precedent. The question will hereafter arise as to the propriety of a decree for an account of the profits, or an assessment of the damages, which accrued before the purchase of the patents.

The motion is granted.

E. N. Dickerson, for the plaintiff.

George Harding and *Franklin D. Locke*, for the defendants.

WILLIAM D. ANDREWS AND OTHERS

vs.

OLIVER COLE. IN EQUITY.

Where a bill is taken *pro confesso*, and there is afterwards a final decree, a docket fee of \$20 is taxable, as part of the plaintiff's costs, under § 824 of the Revised Statutes, for the hearing, as a "final hearing," because the Court must decree the matter of the bill.

(Before WALLACE, J., Southern District of New York, June 3d, 1884.)

WALLACE, J. The defendant objects to the taxation by the clerk of a docket fee of \$20, as part of the costs of the complainant upon a final decree herein. The defendant did not answer or demur to the bill, and the complainant took an order for a decree *pro confesso*, and subsequently obtained a final decree. As the cause has been finally determined, and as its determination involved a hearing by the Court, there has been a final hearing, within the meaning of § 824 of the Revised Statutes, which authorizes a docket fee of \$20 to be taxed.

There has been much discussion of the meaning of the term "final hearing," as used in this section, and a diversity of opinion is found in the decisions. Several cases decide that any order or determination which results in a final disposition of the cause, including a dismissal of the bill on the motion of the complainant, or the dismissal of an appeal by the appellee for irregularity on the part of the appellant in bringing it to a hearing, is a final hearing. (*Hayford v. Griffith*, 3 *Blatchf. C. C. R.*, 79; *The Alert*, 15 *Fed. Rep.*, 620; *Goodyear v. Sawyer*, 17 *Fed. Rep.*, 2.) Other cases hold that there is a final hearing only when some question of law or fact has been submitted to the Court, requiring not merely formal action, but consideration. (*Coy v. Perkins*, 13 *Fed. Rep.*, 111; *Yale*

Palmer v. Travers.

Lock Co. v. Colvin, 21 *Blatchf. C. C. R.*, 168.) The defendant relies upon the authority of the latter decisions; but they are not decisive here, because a complainant is not entitled, as of course, to a final decree, when he has obtained an order *pro confesso*. The matter of the bill is still to be decreed by the Court, and then only when it is proper to be decreed. The bill is to be examined to see if the facts alleged entitle the complainant to relief. According to the earlier practice of the English Chancery, a bill would not be taken *pro confesso* without putting the complainant to prove its material allegations. (*Johnson v. Desmoneere*, 1 *Vern.*, 223.) The later practice is to set down the bill for hearing, upon an order, previously obtained, that the bill be taken *pro confesso*, whereupon the record is produced, and the Court hears the pleadings and pronounces the decree. The complainant is not permitted to take, at his discretion, such a decree as he may be willing to abide by. (*Geary v. Sheridan*, 8 *Vesey*, 192.) This is the practice which obtains under the equity rules of this Court. The consideration of the bill is a hearing, and is final when it results in the final disposition of the cause.

The taxation was correct.

Thomas Richardson, for the plaintiffs.

R. A. Stanton, for the defendant.

ISAAC E. PALMER vs. JAMES P. TRAVERS. IN EQUITY.

A Court of Equity has no jurisdiction of libel or slander affecting title to property or property rights, unless threatened or apprehended repetition makes preventive relief proper and necessary; and a bill will not lie merely for an account of damage from such libel or slander.

(Before WHEELER, J., Southern District of New York, June 6th, 1884.)

WHEELER, J. This suit is brought upon written representations to dealers in hammocks that hammocks made by the orator infringe a patent of the defendant, and threats of suit for the infringement, contained in letters from the defendant's attorneys addressed to such dealers. The bill does not allege that the defendant threatens, nor that the orator believes he intends, to continue such representations or threats, nor even that the orator fears he will. The proof does not go, in this respect, beyond the bill. These representations by letter addressed to persons or firms do not import that they are to be continued, as circulars or advertisements inserted in stated continuous publications might; but each is complete in itself and stands by itself. Courts of equity have no jurisdiction of libel or slander affecting title to property or property rights, or any other slander or libel, unless threatened or apprehended repetition makes preventive relief proper and necessary. The remedy for past injuries of that nature is understood to be wholly at law. On the allegations and proofs here, the orator might, and might not, be entitled to maintain an action at law for these representations and threats and their consequent damage. But, whether he would or not, he is not entitled to maintain a suit in equity merely for an account of such damage. An account might follow, as it does in patent and other cases, if the equitable right to an injunction was made out. There must be some ground for equitable relief before a Court of Equity will grant any relief. (*N. Y. Guaranty Co. v. Memphis Water Co.*, 107 U. S., 205.) No ground for such relief is claimed here, except the right to an injunction; and no ground for an injunction appears, for nothing a Court of Equity would prevent is shown to be impending.

Let there be a decree dismissing the bill of complaint, with costs.

Edwin H. Brown, for the plaintiff.

Louis W. Frost, for the defendant.

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SPENCER ERVIN AND OTHERS

vs.

THE OREGON RAILWAY AND NAVIGATION COMPANY AND
HENRY VILLARD. IN EQUITY.

The case made by the bill was, that a majority of the stockholders of the S. company resolved to avail themselves of their power, as a quorum, to sacrifice the interests of the minority of stockholders, for their own profit, by dissolving the corporation and selling its property and franchises to themselves, at half their real value; and that they had carried out the scheme and retain its fruits, and had deprived the plaintiffs, the minority stockholders, of what would be their share, on a fair division of the corporate property. The bill was filed against the R. company, as such majority of stockholders, and V., as a confederate, to obtain such share: *Held*,

- (1.) The proceeding to dissolve the S. company was regular;
- (2.) The majority of the stockholders could not sell the property to themselves at their own valuation;
- (8.) Neither the S. company, nor its stockholders, other than the plaintiffs, are indispensable parties to the suit;
- (4.) The plaintiffs are entitled to maintain the bill.

(Before WALLACE, J., Southern District of New York, June 6th, 1884.)

WALLACE, J. The principal questions raised by the demurrers to this bill are, whether the Oregon Steam Navigation Company is not an indispensable party whose absence renders the bill defective, and whether the bill states a cause of action in equity. The substantive allegations of the bill are, that, at the time the several transactions complained of took place, the complainants were stockholders of the Oregon Steam Navigation Company, a corporation of the State of Oregon; that, in 1879, that company had a capital of \$5,000,000, divided into 50,000 shares, was prosperous, owned large properties, and had a valuable business; that, in that year, the defendant Villard conceived the scheme of acquiring control of the company and its property, for his own benefit, and, with this view, caused another corporation, the defendant the Ore-

gon Railway and Navigation Company, to be organized under the laws of Oregon, to which the property of the first named company was to be transferred; that he procured himself to be elected president of the new company; that he then purchased 40,000 shares of the old company, and transferred his purchase to the new company, receiving, for himself, a large profit by the transaction; that thereupon he and the new company concerted and consummated the design of winding up the old company, of acquiring all its property and business, for the benefit of the new company, and of excluding the minority stockholders of the old company from their just interest in the assets; that, in this behalf, they caused a board of directors favorable to their scheme to be chosen for the old company, by voting the stock owned by the new company, and, under a statute of Oregon, which permits such a corporation, upon a vote of a majority of the stock, to dissolve and dispose of its property, the defendants procured the dissolution, and a sale and transfer of all the property and franchises of the old corporation to the new corporation. Respecting the proceedings which took place, and the manner in which the dissolution of the old company, and the transfer of its property and franchises to the new company, was effected, the bill sets forth, with particularity and in detail, the history of the transaction. Villard, who was president of the new company, together with some of the directors of that company, were elected, Villard as president, and the others as directors, of the old company. Resolutions were then adopted concurrently by the board of directors of each company, on the part of the old company proposing, and on the part of the new company accepting, the purchase of all the property and franchises of the old company by the new company, at a valuation to be fixed by two appraisers, one to be selected by the old company and one by the new company. The appraisers were selected and agreed upon a valuation of the property at \$2,300,000, which was equivalent to forty-six *per cent.* of the par value of the stock of the old company. Thereupon, the requisite corporate action was taken by the companies, to sanction and confirm the

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transfer at the price fixed by the appraisers, concluding with a meeting of the stockholders of the old company, called to effect a valid dissolution. At this meeting 46,249 shares of stock were represented, all of which were owned by the new company, or in its interest, except 456 shares owned by one Goldsmith, who had opposed the proceeding, but had been placated by the defendants. By the vote of the stock owned by the old company, a resolution was adopted confirming all that had been done by the directors, confirming the sale at the appraisalment which had been made, authorizing the dissolution of the corporation, and directing the directors to carry into effect the dissolution, the sale, the settling of its business, the division of the proceeds of the sale among the stockholders, and the cancellation of all outstanding certificates of stock, with all practicable dispatch. The resolution, so far as it relates to the dissolution, is as follows: "that the said Oregon Steam Navigation Company be and hereby is dissolved, to take effect upon the transfer of the company's property, the settling of its business, and the division of its capital stock." The board of directors then met and took formal action, pursuant to the resolution of the stockholders, and thereafter sent notice, under the company's seal, and signed by its treasurer, to all stockholders, stating that the company was duly dissolved, all its property conveyed to the Oregon Railway and Navigation Company, and that a final dividend of \$46 97 per share had been declared, payable to each stockholder upon the surrender of his certificate of stock. The bill also alleges, that the property of the old company, thus sold, was appraised at a grossly inadequate price; that no money passed, or has ever been actually paid by the new company to the old company, although the directors went through the form, those of one company of delivering, and those of the other of accepting, a check for the purchase-money; that such stockholders of the old company as have surrendered their certificates of stock have been paid the final dividend by the new company; and that the new company now holds itself out as ready to pay the remaining stockholders in the same

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way. The complainants having refused to consent to the proceedings which have taken place, or to participate in the so called dividend, have filed this bill, in behalf of themselves, as minority and dissenting stockholders, and in behalf of all other stockholders who may desire to join. The prayer for relief is, among other things, that the several acts of the defendants complained of be declared fraudulent and void; that the defendants be adjudged to pay the complainants, and such other stockholders as may join them, their proportionate share of the value of all the property and franchises of the Oregon Steam Navigation Company; that the Oregon Railway and Navigation Company be adjudged to hold the property it acquired, as trustee for the complainants, in proportion to their holdings of stock in the former company; and that the complainants be decreed to have a lien thereon.

For the purposes of the demurrers, and assuming the facts alleged in the bill to be true, the case disclosed may be briefly stated as follows: A majority of the stockholders of a corporation resolve to avail themselves of their power, as a quorum, to sacrifice the interest of the minority stockholders, for their own profit, by dissolving the corporation, and selling its property and franchises to themselves, at half their real value; this scheme they have carried out and they now retain its fruits; they have thrust out the complainants, the minority, from their position as stockholders, terminating their relations with the corporation as such, and have deprived them from realizing what would belong to them upon a fair disposition and division of the corporate property. The defendant the Oregon Railway and Navigation Company is this majority of stockholders, and the defendant Villard is a privy and confederate in the whole transaction.

It is to be observed, that the proceedings of the defendants were not outside of the charter or articles of association of the corporation, but, on the contrary, were carefully pursued according to the forms of the organic law. They had a right to dissolve the corporation and dispose of its property and distribute the proceeds. The minority cannot be heard

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to complain of this, because the laws of Oregon permitted it, and because it is an implied condition of the association of stockholders in a corporation, that the majority shall have power to bind the whole body as to all transactions within the scope of the corporate powers. (*Durfee v. Old Colony & F. R. R. Co.*, 5 *Allen*, 230; *Bill v. Western Union Tel. Co.*, 16 *Fed. Rep.*, 19.) Nor does it matter, in legal contemplation, that the majority were actuated by dishonorable or even corrupt motives, so long as their acts were legitimate. In equity, as at law, a fraudulent intent is not the subject of judicial cognizance, unless accompanied by a wrongful act. (*Clark v. White*, 12 *Peters*, 178.) In other words, if the majority had the right to wind up the corporation at their election, and they availed themselves of it in the mode which was permitted by the organic law of the corporation, neither a Court of law nor a Court of equity can entertain an inquiry as to the motives which influenced them. The power to do this was undoubted.

But, the right of the majority to sell the property to themselves at their own valuation is a very different matter. It cannot be implied from the contract of association, and will not be tolerated by a Court of equity. As is said by Mellish, Lord Justice, in *Menier v. Hooper's Telegraph Works*, (L. R., 9 *Ch. App.*, 350, 354 :) "Although it may be quite true that the shareholders of a company may vote as they please, and for the purpose of their own interests, yet the majority of shareholders cannot sell the assets of the company and keep the consideration, but must allow the minority to have their share of any consideration which may come to them." If the majority sell the assets to themselves, they must account for their fair value. They cannot bind the minority by fixing their own price upon the assets. A majority have no right to exercise the control over the corporate management which legitimately belongs to them, for the purpose of appropriating the corporate property, or its avails, to themselves, or to any of the shareholders, to the exclusion or prejudice of the others. (*Brewer v. Boston Theatre*, 104 *Mass.*, 378,

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395; *Preston v. Grand Collier Dock Co.*, 11 Sim., 327; *Hodgkinson v. National Live Stock Ins. Co.*, 26 Beav. 473; *Atwood v. Merryweather, L. R.*, 5 Eq., 464, note.) In *Gregory v. Patchett*, (33 Beavan, 595,) the property of a company was transferred to two shareholders, in lieu of their shares, and the company was thereby practically put an end to, and the debts were thrown on the remaining shareholders. This was sanctioned by a majority of the shareholders at a general meeting; but it was held that the majority could not bind the minority in such a transaction, and it was set aside.

These observations sufficiently indicate the conclusion, that the complainants are entitled to equitable relief upon such a state of facts as is exhibited by the bill. The question remains, whether that relief can be obtained in the present suit. The defendants insist, by their demurrers, that the Oregon Steam Navigation Company is an indispensable party to the controversy. They also insist, in argument, that all the stockholders of that company are indispensable parties, if the corporation is not a party.

There does not seem to be any good reason why the Oregon Steam Navigation Company should be deemed an indispensable party. It is not a going concern. If the sale of the property should be set aside, the corporation would be only a dry trustee, for the purpose of dividing the property among the beneficial owners. The reason why such a trustee is required to be a party to a suit respecting the property is in order to bind the legal title by the decree. But, here, there is no trustee to dispute the legal title with the defendants. The majority stockholders exercised their lawful power to dissolve the corporation and sell its property, and they thus terminated the conventional relations between the corporation and its stockholders. They could not, however, prevent the equitable owners of the assets from following them into the hands of the defendants, and calling upon the defendants to account for their fair value. Although the resolution of the last stockholders' meeting declared that the corporation "was thereby dissolved, to take effect on the transfer of the

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company's property, the settling of its business and the division of its capital stock," the board of directors were constituted the body to carry the resolution into effect. They proceeded to carry it into effect by settling its business, disposing of all its property, declaring a final dividend, and notifying the stockholders that the corporation was dissolved. Generally, it is no doubt true, that the legal existence of a corporation only ceases when the surrender of its franchises has been accepted by the State. But the statute of Oregon, authorizing a dissolution upon the majority vote of the stockholders, would seem to be an acceptance in advance. Although the corporation may not be effectually extinguished, as against creditors, there is no difficulty in concluding that it is so far extinct that it cannot stand in the way of the enforcement, by its former stockholders, of their equitable rights to a fair accounting from those who have assumed to distribute its assets. (*Gregory v. Patchett*, 33 *Beav.*, 597, 608; *State Savings Association v. Kellogg*, 52 *Mo.*, 583; *Perry v. Turner*, 55 *Mo.*, 418.)

It is urged, that, if the corporation is not a necessary party to the suit, no relief can be had unless all the stockholders are made parties. This point is not specifically presented by the demurrers; but, if no relief can be decreed until such absent parties are brought in, it would seem that the objection might be considered upon the demurrer for want of equity. (See *Vernon v. Vernon*, cited in *Story's Eq. Pl.*, § 543, *note*.) Who these stockholders are, and whether they are within the jurisdiction of the Court, does not appear. If the only relief prayed by the bill, or which could be granted upon the facts alleged, were a rescission of the sale of the property, the objection might be fatal. (*Ribon v. Railroad Cos.*, 16 *Wall.*, 446.) No relief could be granted without affecting the rights of every stockholder. But, the redress which is given to a *cestui que trust*, or an equitable owner of a fund, in case of a fraudulent purchase by the trustee, or other fiduciary, is either rescission or account, at the election of the injured party. (*Bispham's Eq.*, 239.) Here, the complainants pray for an ac-

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count, and the decree may limit them to that relief. No rights of the other stockholders will be affected, if such relief is granted to the complainants. Although the defendants may be called upon to meet similar claims in behalf of other stockholders, that circumstance does not stand in the way of the complainants. It suffices that relief can be granted which will not affect the rights of other stockholders. Nor does it matter that there may be other stockholders of the corporation who co-operated with the defendants in the wrongs complained of. The theory of the bill is, that these defendants, while occupying the fiduciary relation towards the complainants, of equitable joint owners of the property, bought it themselves, at an inadequate price and by unfair means. They are in the position of *quasi* trustees, who have been guilty of a fraudulent breach of their trust. The right of action in such case is *ex delicto*, and the tort may be treated as several or joint; and the trustees have no right of contribution, as between themselves. (*Peck v. Ellis*, 2 *John. Ch.*, 131; *Miller v. Fenton*, 11 *Paige*, 18; *Heath v. Erie R. R. Co.*, 8 *Blatchf. C. C. R.*, 347; *Wilkinson v. Parry*, 4 *Russ.*, 272; *Franco v. Franco*, 3 *Ves.*, 75.)

In conclusion, it may be said, that it does not lie with the defendants, who claim to have sold and divided the assets of the corporation among those who were stockholders, so that each is entitled to a specified proportion, as a final dividend, to insist that others, who were also stockholders, have any interest in the question whether the sum which has been set aside for the complainants is their fair share or not. The other stockholders can acquiesce or ratify, if they please. The complainants cannot be affected by their action, and do not have any interest in it. The complainants occupy, substantially, the position of creditors of the corporation, seeking to obtain satisfaction of their just claim out of the fund in the hands of the defendants, and having an equitable lien. Such creditors can pursue the fund wherever they can find it, without making the stockholders parties, or bringing in

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all who are liable to account to the fund, or have an interest in its distribution. (*Hatch v. Dana*, 101 U. S., 205.)

These views meet the important questions raised by the demurrers. The other grounds of demurrer have been considered and are deemed to be untenable.

The demurrers are overruled.

William Allen Butler and *Thomas H. Hubbard*, for the plaintiffs.

Artemas H. Holmes, for the defendants.

ALMIRA R. CLARE, AS ADMINISTRATRIX, &C.

vs.

THE PROVIDENCE AND STONINGTON STEAMSHIP COMPANY.

A speed of about 11 knots an hour, (between 12½ and 13 miles,) by a steamer, in Long Island Sound, in a fog, near midnight, is not the "moderate speed" required by sailing rule No. 21, (*Rev. Stat.*, § 4,233,) and, where the death of a passenger on a vessel with which the steamer collides, in the fog, while going at such speed, is caused by such collision, the owner of the steamer will be held liable for the negligence resulting in such death.

(Before COXE, J., Southern District of New York, June 7th, 1884.)

COXE, J. This action is brought by Almira R. Clare, as administratrix of Charles C. Clare, her deceased husband, to recover damages of the defendants, for having negligently caused his death. The defendants are common carriers, and, on the eleventh of June, 1880, they were the owners of two steamers, the Narragansett and the Stonington. On the

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evening of that day, the former was proceeding from New York to Stonington, Connecticut, and the latter from Stonington to New York, via Long Island Sound. At about 11.30 p. m., which was their usual hour for meeting, the two vessels collided, the Narragansett, upon which the plaintiff's intestate was a passenger, took fire and sank, and he was drowned. The Sound, at this point, is about 12 miles wide. The night was still and dark, and there was a dense fog. Both vessels were upon the same course, going at about 11 knots (between 12½ and 13 miles) per hour. This was their usual rate of speed. Though it was customary for the Stonington to make her trips with two pilots, on this occasion she had but one. When she first sighted the Narragansett, the latter was about 150 feet distant, headed across the Stonington's bow. The Stonington then gave signals, in quick succession, to slow down, to stop, to back water and to back strong. It was then too late. There was not time enough to stop. The Stonington was, prior to the collision, engaged in signalling approaching vessels to go to the right, by short blasts upon her whistle. She was also blowing fog whistles, about three times per minute. She heard the Narragansett's fog whistle when the latter was from three to five minutes off, apparently about a point and a half on her port bow. The wheel of the Stonington was then put hard-a-port and her head turned about five points to the right, but her speed was not slackened. The captain of the Narragansett, on the contrary, testified that he made the Stonington a point or a point and a half on his starboard bow, and he gave orders to starboard his helm.

The defendants introduced testimony to prove that experience has demonstrated, that, in fogs on Long Island Sound, accidents are less likely to occur if vessels are run at full speed. The Sound is navigated by taking a course from light to light. In thick weather, it is customary, after leaving one light, to run the time nearly up which is required to make the next light, at the usual rate of speed. The boat is then stopped, and, feeling her way cautiously by sounding,

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she makes the second light, and this is repeated through the Sound.

It is urged, that, if the rate of speed is changed, or the boat stopped except in the vicinity of a light, the reckoning will be lost, or, at least, less accurately attained; that, if the steamer is slowed down in the strong currents and crossed tides of the Sound, the danger of drifting or running on to the rocks, reefs and points, which everywhere abound, is vastly increased. In short, it is maintained, by those accustomed to the navigation of the Sound, that, by keeping up the regular speed, they are better able to make their course, handle their boat and tell their whereabouts, than by adopting a different rule.

The defendants introduced the record of the proceedings in the District Court in the matter of the Narragansett, taken under the Act of March 3d, 1851, entitled, "An Act to limit the liability of ship-owners and for other purposes," (9 *U. S. Stat. at Large*, 635;) and they insist that the decree there rendered constitutes a bar to this action. The Court decided that this position was well taken as to the Narragansett, but that, in so far as the plaintiff's right to recover depended upon the negligence of the Stonington, which was not surrendered, the proceedings in the District Court were not a bar, and that the question whether or not the Stonington was at fault should be submitted to the jury. The jury found for the defendants, and the plaintiff now moves for a new trial on several grounds, only one of which will be considered.

It is urged that the verdict should be set aside as contrary to evidence and to law, for the reason that there was a clear and palpable violation of sailing rule No. 21. The rule is as follows: "Every steam-vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam-vessel shall, when in a fog, go at a moderate speed." (*Rev. Stat.*, § 4,233, *p.* 818, *2d ed.*)

No case has been found, where this rule was under consideration, which holds that 12½ or 13 miles an hour is a moder-

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ate speed for a steam-vessel in a fog. On the contrary, the decisions are unanimously the other way. *The Pennsylvania*, 19 Wall., 125, 133, (7 knots;) *The Colorado*, 91 U. S., 692, (5 or 6 miles;) *The Blackstone*, 1 Lowell, 488, (8 knots;) *The Rhode Island*, 17 Fed. Rep., 554, (15 miles;) *The State of Alabama*, 17 Id., 847, (8 or 8½ knots;) *The City of New York*, 15 Id., 624, (10 knots;) *The Eleanora*, 17 Blatchf. C. C. R., 88, 100, (between 5 and 6 miles;) *The Leland*, 19 Fed. Rep., 771, (8 miles;) *The Bristol*, 4 Ben., 397, (16 miles;) *The Hansa*, 5 Id., 501, (7 knots;) *The Manistee*, 7 Biss., 35, (7 miles.) It is true, that the foregoing are causes in the Admiralty; and the criticism is made, that the question of speed was determined as a question of fact. It is urged, by the defendants, that, because one Court concludes, upon the evidence before it, in a particular case, that 8 knots per hour, for instance, is immoderate speed, no reason is therefore suggested, why another tribunal, in different circumstances, should reach the same conclusion; and that, to argue to the contrary is tantamount to the absurdity of contending that, because a jury determines that 25 miles an hour is too high a rate of speed for a railroad train at a particular crossing, every other jury, in similar cases, should be constrained to find the same way. This position would quite likely be well founded, if the only questions decided were questions of fact; but it will be observed, that, in several of the cases referred to, some of which were not presented to the Court upon the trial or argument, a construction is placed upon rule 21, that, in all circumstances, "moderate speed" means less than usual speed.

In *The Pennsylvania*, (19 Wallace, 125,) the Court, at page 133, says: "Our rules of navigation, as well as the British rules, require every steamship, when in a fog, 'to go at a moderate speed.' What is such speed may not be precisely definable. It must depend upon the circumstances of each case. That may be moderate and reasonable in some circumstances which would be quite immoderate in others. But, the purpose of the requirement being to guard against danger of

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collisions, very plainly the speed should be reduced as the risk of meeting vessels is increased. * * * And even if it be true that such a rate" (7 knots) "was necessary for safe steerage, it would not justify driving the steamer through so dense a fog, along a route so much frequented, and when the probability of encountering other vessels was so great. . It would rather have been her duty to lay to."

In *The Blackstone*, (1 *Lowell*, 485,) the Court, adopting the language of another case in the same Circuit, says, at page 488: "What would be a moderate speed in the open sea, would not be allowable in a crowded thoroughfare or in a narrow channel. And, under the same circumstances in other respects, the speed should be the more moderate according as the fog is more dense. The only rule to be extracted from the statute and a comparison of the decided cases is, that the duty of going at a moderate speed in a fog requires a speed sufficiently moderate to enable the steamer, under ordinary circumstances, seasonably, usefully and effectually to do the three things required of her in the same clause of the statute, viz., to slacken her speed, or, if necessary, to stop and reverse."

In *The Colorado*, (91 *U. S.*, 692,) the Court, at page 702, uses this language: "Different formulas have been suggested by different judges, as criterions for determining whether the speed of a steamer in any given case was or was not greater than was consistent with the duty which the steamer owed to other vessels navigating the same waters; but, perhaps, no one yet suggested is more useful, or better suited to enable the inquirer to reach a correct conclusion, than the one adopted by the Privy Council. (*The Batavier*, 40 *Eng. L. & Eq.*, 25.) In that case the Court say, 'At whatever rate she (the steamer) was going, if going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate.'"

In *The Rhode Island*, (17 *Fed. Rep.*, 554,) the Court says, at page 557: "The rate of speed at which the Rhode Island was going in a dense fog, viz., 15 miles per hour, is far beyond

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that 'moderate speed' which the rules of navigation permit. This has been so often discussed, and the prior adjudications are so numerous and uniform, that it cannot be deemed longer an open question."

In *The State of Alabama*, (*Id.*, 847,) the Court says, at page 852: "The failure to slacken speed in this fog must be set down as one fault in the steamer. Although the fog was not dense, it was, nevertheless, evidently such a fog as materially to interfere with the timely observation of other vessels, and, therefore, increased materially the dangers of navigation. To go at full speed in such a fog is not a compliance with rule 21, which requires steamers in a fog to go at moderate speed.

* * * * No steamer's speed is moderate, in the sense of rule 21, so long as she is going at her ordinary full speed. She is required to moderate and reduce her speed according to the density of the fog and the increased difficulty of discovering danger, and of adopting timely means to avoid it. * * * * Without determining whether 8 or 8½ knots would or would not be a moderate rate for vessels of much higher ordinary speed, in so light a fog as prevailed on the night of this collision, I must hold it not moderate for this steamer, because not moderated or reduced from her ordinary speed."

In *The City of New York*, (15 *Fed Rep.*, 624,) the Court, having under consideration rule 21, says, at page 627: "This rule plainly imposes upon a steamer two duties; (1) to proceed in a fog at a *moderate* speed; (2) in approaching another vessel, so as to involve danger of collision, to *slacken* her speed, and, if necessary, to stop and back. * * * * Whatever 'moderate speed' may be, under given circumstances, * * * it is, at least, something materially less than that full speed which is customary and allowable when there are no obstructions in the way of safe navigation. To continue at full speed, therefore, as the steamer in this case substantially did, or until the bark was in sight, was a clear violation of the statutory obligation to go at moderate speed."

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In *The Eleanor*, (17 *Blatchf. C. C. R.*, 88,) the Court, at page 100, says: "A simple slackening of speed by a steamer in a fog is not always enough. She must run at a moderate speed, and is never justified in coming in collision with another vessel, if it be possible to avoid it. This implies such a speed only as is consistent with the utmost caution. * * * * Her rate of speed must be graduated according to the circumstances. The more dense the fog the greater the necessity for moderation."

In *The Leland*, (19 *Fed. Rep.*, 771,) the Court, at page 773, says: "It is an undoubted violation of the sailing rules, for a steamer to run at a reckless or dangerous rate of speed in a fog. What is a moderate, and what is a dangerous, rate of speed, are, of course, to some extent, comparative terms, depending upon surrounding circumstances. * * * * This rate of speed," (8 miles per hour) "I have no doubt, was too great in a dense fog, in the night time, upon waters where the liability to collision was so imminent as on the waters of Lake Michigan, even at this early season of the year."

In *The Manistee*, (7 *Biss.*, 35,) the Court says: "I know what steam-boat men say, that they must make their time; that they must run in the fog. But they cannot be permitted to run with their usual speed in a fog, surrounded by sail-vessels, against which they are liable to collide at any moment."

The conclusion derived from these authorities is this, that "moderate speed" means moderated speed; reduced speed; less than usual speed. It was not the intention of Congress that steam-vessels should run as fast in a fog as in fair weather. Applying the rule so construed to the *Stonington*, there is no possible escape from the conviction that she was guilty of a grave maritime fault. The law said to her that she must not run at the rate of 11 knots an hour in a fog, and, yet, in total disregard of the statute, she was running at 11 knots an hour, at midnight, in a dense fog, and at a time when she knew that she was in close proximity to the colliding vessel. She was

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going so fast that all efforts to avoid or mitigate the collision were unavailing.

It can hardly be contended that this high rate of speed did not produce or contribute to the accident. Had the steamer been going at a less rate, not only would she in all probability have heard the signals sooner, but she could have stopped in less space, and, though the collision might have occurred, the blow would have been less severe. Within the cases cited, it must be said, upon this evidence, that the Stonington was at fault, and that the finding of the jury exculpating her was not in accordance with the evidence and the law.

It is thought that the sailing rule referred to, which has its counterpart in the English Admiralty, contains provisions the wisdom of which can hardly be disputed. If, in the opinion of others, it states an erroneous principle of navigation, it behooves those interested to petition Congress for its repeal or modification, so far as it relates to Long Island Sound. While it remains the law, it is incumbent upon the Courts to see that it is properly enforced. Those who violate it should do so at their peril. If the owners of vessels navigating the Sound choose to take a course forbidden by law, they should clearly understand, that, when loss and injury happen, they must take the consequences, and that the excuse that the unlawful way is the best way will not be accepted by the Courts.

A new trial is ordered.

Isaac N. Miller, for the plaintiff.

Wheeler H. Peckham for the defendant.

The Land Company of New Mexico v. Elkins.

THE LAND COMPANY OF NEW MEXICO, LIMITED

vs.

STEVEN B. ELKINS AND OTHERS. IN EQUITY.

A citizen of the District of Columbia is not a citizen of a State, within the meaning of the statutes conferring jurisdiction on the Circuit Courts of the United States, and the jurisdiction of those Courts does not extend to a controversy between an alien and a citizen of the United States who is not a citizen of a State.

A bill in equity by L., against E., and S., and B., alleged that E. and S. agreed to buy land; that it was bought, and title taken in the name of E.; that S. paid his share of the price, and became entitled to a conveyance of his share of the land; that L. had acquired the interest of S.; that S. had assumed to convey that interest to B.; and that E. threatened to convey to B.: *Held*, that S. was a necessary party to the suit, and that, as the Court had no jurisdiction as to him, no injunction could be granted against E.

An amendment of the bill cannot be allowed, which would amount to a new and materially different suit, either as to parties or as to cause of action.

(Before WALLACE, J., Southern District of New York, June 7th, 1884.)

WALLACE, J. The complainant, a British corporation, has filed this bill against Elkins, a resident of New York, Smoot, a resident of the District of Columbia, Butler, a resident of Massachusetts, and three other defendants, alleging, in substance, that Elkins, Smoot and three others entered into an agreement for the joint purchase of a tract of land in New Mexico; that the land was purchased, and the title taken in the name of Elkins; that Smoot advanced his share of the purchase-money, and, under the terms of the agreement, became entitled to a conveyance of an undivided fifth part of the land; that the complainant has acquired Smoot's interest by purchase; that Elkins has recognized the purchase by complainant of Smoot's interest; that Smoot has assumed to assign and convey the interest acquired of him by the complainant to the defendant Butler; and that Elkins refuses to convey

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the same to the complainant, and threatens to convey the same to Butler. The bill prays for a conveyance by Elkins, of Smoot's interest, to the complainant, and for an injunction against Elkins, Smoot and Butler, from interfering with the complainant's interests.

The defendant Smoot moves to dismiss the bill as to him, for want of jurisdiction. This motion must prevail, because it is well settled, that a citizen of the District of Columbia is not a citizen of a State, within the meaning of the Judiciary Act and the subsequent Acts conferring jurisdiction upon the Circuit Courts of the United States, and the jurisdiction of this Court does not extend to a controversy between an alien and a citizen of the United States who is not a citizen of a State. (*Hepburn v. Ellzey*, 2 Cranch, 445; *Barney v. Baltimore City*, 6 Wall., 280; *New Orleans v. Winter*, 1 Wheat., 91.)

The complainant moves for a preliminary injunction against Elkins, and he resists the motion, upon the ground that no relief can be decreed against him upon the bill. His contention is, that Smoot is an indispensable party to the suit, and, as there can be no decree against Smoot, there can be none against him. If Smoot's interest in the controversy is such that a final decree could not be made against Elkins without affecting that interest, or leaving the controversy in such condition that its final determination may be inconsistent with justice, the Court will not proceed in his absence. (*Williams v. Bankhead*, 19 Wall., 563; *Florence Co. v. Singer Co.*, 8 Blatchf. C. C. R., 113; *Mallow v. Hinde*, 12 Wheat., 193; *Bank v. Carrollton R. R.*, 11 Wall., 624.) If the complainant had acquired Smoot's interest in the lands by a transfer absolute and fully executed, the latter would not be a necessary party to the controversy. (*Blake v. Jones*, 3 Anst., 651.) An assignor who has made an absolute assignment of his interest need not be a party to a suit by the assignee to enforce the equitable title acquired by the transfer, against a third party, even when the former retains the legal title. (*Barbour on Parties*, 463; *Trecothick v. Austin*, 4 Mason, 41; *Ward*

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v. *Van Bokkelen*, 2 *Paige*, 289, 295.) But, the agreement under which the complainant acquired Smoot's interest in the land is executory, and Smoot is now asserting a right to transfer the same interest to Butler. A decree cannot be made without affecting his rights. If Elkins is adjudged to convey to the complainant, Smoot's interest in the lands will be divested. Not being bound by the decree, he might still contest with Elkins, and insist that he account for the value of the interest conveyed to the complainant under the decree; but this might be a barren remedy. As Smoot cannot be made a party, no decree can be obtained by the complainant, for the relief prayed in the bill. The motion for an injunction must, therefore, be denied.

The complainant cannot be permitted to amend its bill, as is suggested in its behalf, by omitting all the parties but Elkins, and proceeding against him, upon the theory that the complainant has acquired Smoot's interest by an absolute and unconditional transfer. An amendment cannot be allowed which would, in effect, amount to the institution of a new and materially different suit, either as to parties or as to cause of action. (*Goodyear v. Bourn*, 3 *Blatchf. C. C. R.*, 266; *Oglesby v. Attrill*, 4 *Woods*, 114.)

Simon Sterne, for the plaintiff.

William G. Choate, for the defendant Elkins.

Roger A. Pryor, for the defendant Butler.

The Consolidated Electric Light Co. v. The Brush-Swan Electric Light Co.

THE CONSOLIDATED ELECTRIC LIGHT COMPANY

vs.

THE BRUSH-SWAN ELECTRIC LIGHT COMPANY. IN EQUITY.

A bill in equity on five different patents alleged that the inventions were capable of being used conjointly; that the plaintiff made, used and sold them conjointly, as parts of the same electric lighting system; and that the defendant infringed all of the patents, by making, selling and using all of the inventions conjointly, in a system of electric lighting. It appeared, by the patents, that the inventions could be used separately, and operate independently, with respect to each other, and, though used in the same system, were distinct parts of the system. A demurrer to the bill was sustained.

(Before WHEELER, J., Southern District of New York, June 10th, 1884.)

WHEELER, J. This is an amended bill, brought upon five different patents, one for an electric lighting system, one for an improved regulator for electric lights, one for an improvement in electric lamps, one for an improvement in carbons for electric lights, and one for an improvement in the treatment of carbons for electric lights, and is demurred to for multifariousness. The bill alleges, that the patented inventions are capable of being used conjointly; that the orator makes, uses and sells conjointly, as parts of the same electric lighting system, each and all of said inventions, in some essential and material parts thereof; and that the defendant is infringing each and all of these patents, by making, selling and using each and all of said inventions conjointly, in a system of electric lighting, the same substantially as that of the orator. The titles of the patents, as well as the patents themselves, of which profert is made, show that these inventions may be used separately, and operate independently, with respect to each other. Any of them might be infringed without infringing any of the others. The trial of the validity of

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each, and of the infringement of each, must be separate from that of the others, upon distinct issues as to each. The facts may be proved by the same witnesses, but, if so, it will be on account of identity of persons in connection with the subject, rather than because of the sameness of the issues involved in the subject. That they are used in the same system does not change the nature of the issues to be tried. They are distinct parts of the system. Each patent is for a distinct machine, or process, or manufacture, and must stand or fall as such; and the infringement of each must or may be a separate trespass. The bill, apparently, covers as many causes as there are patents, when it should cover but one. (*Hayes v. Dayton*, 18 *Blatchf. C. C. R.*, 420.)

The demurrer is sustained, and the bill adjudged insufficient.

Amos Broadnax, for the plaintiff.

William C. Witter, *Eugene H. Lewis* and *Samuel A. Duncan*, for the defendant.

HANNAH B. LULL

vs.

JOHN K. CLARK AND OTHERS. IN EQUITY.

In making a decree for an account, in a suit in equity for the infringement of a patent for a hinge, the Court held a certain hinge to be an infringement. On the reference, the master held that he could not extend the accounting to other hinges, as infringements. The plaintiff then moved for an order directing the master to take an account covering such other hinges. The motion was denied, as a practice not sustained by authority or usage, and as inconvenient.

(Before Coxe, J., Northern District of New York, June 11th, 1884.)

COXE, J. This is a motion to instruct the master in an equity action. The complainant has a patent for an "improvement in shutter hinges." The Court heretofore sustained the patent, and directed a decree for an injunction and an account. (21 *Blatchf. C. C. R.*, 95.) The infringing device introduced by the complainant on the trial was a hinge known as No. 1. On the accounting, she sought to extend the investigation to several other hinges manufactured and sold by the defendants, contending that they were substantially the same as No. 1, and that they were covered by the decree. To this the defendants objected, on the ground, *inter alia*, that the hinges other than No. 1 do not infringe, and, in the absence of a decision by the Court holding that they infringe, the master had no authority to proceed. This objection was sustained by the master, and complainant's counsel excepted, and immediately gave notice of a motion for an order directing and instructing the master to take and state, and report to the Court, an account covering all the hinges referred to. A certified copy of the proceedings before the master is presented upon this motion. But the master has made no report and has not sought instruction or advice from the Court.

The first objection interposed by the defendants is, that this application is irregular, and is not sustained by authority or the practice of the Court. I am of the opinion that the objection is well taken. Rule 77 gives the master very general discretion in the conduct of the investigation before him. He occupies, for the time being, the position of the Court, and is not to be continually interfered with, while discharging his duties to the best of his ability. It would create intolerable delays and confusion, besides putting an unnecessary burden upon the Court, to hold, that each time the master makes a ruling the aggrieved party may, by special motion, have it reviewed. The orderly, and, it seems, the generally accepted, procedure is, to present all the questions arising before the master by objections and exceptions to his report.

Let it be assumed that the direction asked for is within the discretion of the Court. It has not been customary to exer-

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cise it, and, in my judgment, it ought not to be exercised in a case like the present, where the master simply makes a ruling which he has an undoubted right to make. A decision for the complainant will be recorded for a precedent, and the attention of the Court continually occupied with similar applications. A simple and well understood system will thus be involved in confusion and uncertainty. The weight of authority sustains the view here taken. (*The Union Sugar Refinery v. Mathiesson*, 3 *Clifford*, 146; *Wooster v. Gumbirner*, 20 *Fed. Rep.*, 167; *Anon.*, 3 *Atkins*, 524; *Vanderwick v. Summerl.*, 2 *Wash. C. C. R.*, 41; *Daniell's Ch. Pr.*, [5th *Am. ed.*], 1,181.)

The motion must be denied, but without prejudice to any other remedy the complainant may see fit to take.

Livingston Gifford, for the plaintiff.

George J. Sicard, for the defendants.

THE ROYAL ARCH.

In this case, a schooner, the R., sailing close-hauled, on the starboard tack, in the night, did not have her regulation side lights, and especially her green light, properly and brightly burning. She collided with another schooner, the N., whose red light she saw, and which was sailing on the port tack. The N., though vigilant, did not see any light on the R., and did not see the R. till it was too late to avoid a collision. The R. kept her course: *Held*, that the failure of the R. to exhibit any light which the N. could see, relieved the N. from her duty to avoid the R., and the ignorance of the N. as to the course of the R. until it was too late for the N. to do anything to avoid a collision was excusable, and was produced by such fault of the R.; and that the R. was liable for the damage to the N.

(Before BLATCHFORD, J., Eastern District of New York, June 12th, 1884.)

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THIS was a libel *in rem*, filed in the District Court, to recover damages for a collision. That Court dismissed the libel, with costs, and the libellants appealed to this Court.

Owen & Gray, for the libellants.

Goodrich, Deady & Platt, for the claimants.

BLATCHFORD, J. In this case I find the following facts:

1. Shortly after four o'clock on the morning of the 6th of February, 1884, a collision occurred between the schooner *Nellie Floyd* and the schooner *Royal Arch*, by which both vessels were seriously damaged. The former was bound from Georgetown, South Carolina, to New York; the latter from Wiscasset, Maine, to Baltimore, Maryland. The collision took place on the Atlantic Ocean, at a point about south southeast from the Navesink Highlands, off the coast of New Jersey.

2. At the time the night was dark, and the weather was somewhat hazy, but lights of vessels could be seen at a considerable distance off, and, if of the character required by law, and capable of being seen on a dark night, with a clear atmosphere, at the distance required by law, could be seen, at the time in question, by proper observers, at a sufficient distance off to enable a collision to be avoided by them. The wind was from southwest to south southwest, blowing a fresh breeze. Previous to and at the time of the collision the *Nellie Floyd* had her regulation side lights properly set and brightly burning, and a competent and vigilant look-out, properly stationed and faithfully attending to his duties. She was sailing free, on her port tack, at a speed of about six or seven miles an hour. For about an hour before the collision, she had been steering by compass, north by west. The *Royal Arch* was sailing close-hauled, on her starboard tack, at a speed of from three to four miles an hour.

3. The *Royal Arch* was first discovered by the *Nellie Floyd* when distant about half a mile, bearing off the *Nellie Floyd's* port bow. Although the *Royal Arch* had her regula-

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tion lights set and burning, her green light, on her starboard side, which was the light which would have been visible to those on the Nellie Floyd, if it had been of the character required by law, and capable of being seen on a dark night, with a clear atmosphere, at the distance required by law, and could have been seen at the time by those on board of the Nellie Floyd, if it had been of the character required by law, and capable of being seen on a dark night, with a clear atmosphere, at the distance required by law, was not seen by those on board of the Nellie Floyd, although they were vigilant and attentive to their duty in looking out for vessels and lights, for the reason that such green light of the Royal Arch was not of the character required by law, and was not capable of being seen on a dark night, with a clear atmosphere, at the distance required by law, and was not of such a character as to brightness that it could have been seen at the time, by those on board of the Nellie Floyd, in season for them to avoid a collision. Those on the Nellie Floyd were vigilant and attentive to their duty, but, not seeing any light on the Royal Arch, saw nothing of her till they saw her sails, and then were unable to determine what course the Royal Arch was on, and she was reported by the lookout as a sail on the weather bow. From the time she was first discovered and reported to the time of the collision, she was continually watched from the Nellie Floyd, the master of the latter using his glasses.

4. As soon as the course of the Royal Arch could be determined, the helm of the Nellie Floyd was put hard up, and her mizzen peak was dropped, and, although she fell off, still the vessels were so close to each other that the Nellie Floyd could not avoid the collision.

5. At no time after the Royal Arch was first discovered from the Nellie Floyd, were any side lights, or any other light, upon the Royal Arch, visible to or capable of being seen by those on board of the Nellie Floyd, and the latter were, both prior to that time, and, during all that time, exercising proper vigilance, watchfulness and attention in looking

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for some light upon the Royal Arch, down to the time of the collision.

6. The red light of the Nellie Floyd was seen from the Royal Arch, three-quarters of a mile off, about three points off her starboard bow. Nothing was done on board of the Royal Arch to avoid a collision until it was too late, although the courses of the vessels were such, if continued, as to render a collision inevitable. After the red light of the Nellie Floyd was discovered from the Royal Arch, there was time enough, before the collision, for the Royal Arch to change her course and avoid a collision, by putting her helm down, provided the Nellie Floyd should keep her course. The Royal Arch kept her course until just before the collision, when she attempted to alter it so as to avoid a collision, but there was then not sufficient time for her to make a successful change.

On the foregoing facts I find the following conclusions of law:

1. The Royal Arch was improperly navigated, in that she did not have her regulation side lights, and especially her green light, properly and brightly burning, and for that reason she was the sole culpable cause of the collision. It was her duty to keep her course, as she did, on seeing the red light of the Nellie Floyd. It was the duty of the Nellie Floyd to avoid the Royal Arch, but she was relieved from such duty by the failure of the Royal Arch to exhibit any light which those on the Nellie Floyd could see before the collision, and their ignorance of the course of the Royal Arch until it was too late for the Nellie Floyd to do anything to avoid the collision was excusable and was produced by such fault of the Royal Arch.

2. The Nellie Floyd was, in every respect, properly and carefully navigated, and in no wise caused, or tended to cause, the collision.

3. The decree of the District Court must be reversed, and a decree be entered for the libellants for their damages, with interest, and their costs in the District Court and in this Court, such damages to be ascertained by a reference in this Court.

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The District Judge, in his opinion, states, that, after a careful examination of the testimony, and with some hesitation, he has arrived at the conclusion, that the collision was attributable "to the omission to keep a careful lookout on the Nellie Floyd, and not to a failure on the part of the Royal Arch to exhibit the lights required by law." The testimony was none of it taken in Court before the Judge, but all of it by deposition, out of Court. In this Court there has been added to the proof for the libellants the deposition of the master of a vessel which was sailing on the same course with the Nellie Floyd at the time, and just behind her, and who, though using his opera glass, saw no light on the Royal Arch, when the latter was approaching in such a position that her green light ought to have been seen by him, as well as from the Nellie Floyd, if it had been a proper light. On the whole evidence, I must pronounce for the Nellie Floyd.

IN THE MATTER OF GERALD THOMAS TULLY, ON HABEAS
CORPUS.

T., the sub-manager of a bank in England, drew a check on an agent of the bank, received the money on it, and kept it, and turned into the bank a "blue slip," showing a debit and a credit in respect to the amount, the credit being correct but the debit fictitious. Being arrested for extradition, under the Treaty with Great Britain, on a charge of forgery, the Commissioner decided that the "blue slip" transaction was forgery, within the Treaty. On *habeas corpus* and *certiorari*: *Held*, that, regarding the "blue slip" as amounting to an entry by T. in the books of the bank, the transaction was not forgery, according to the rule prevailing in England, and the decision of the Court of Appeal, in the case of *In re Windsor*, (6 *Best & Smith*, 522.)

(Before BROWN, J., Southern District of New York, June 18th, 1884.)

BROWN, J. Gerald Thomas Tully, having been held by a United States Commissioner for extradition to England on a

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charge of forgery, the accused has been brought before this Court, together with the proceedings upon which he was held, upon writs of *habeas corpus* and *certiorari*. There is no dispute about the facts. The only question presented is, whether the offence constitutes the crime of forgery, under the Treaty with Great Britain.

The record shows, that Tully was the sub-manager of the Preston Banking Company, Limited, a banking company in Preston, England; that the bank had various banking agencies in the vicinity, accustomed to have funds on its account; that it was the duty of Tully, as sub-manager, to regulate the balances standing to the bank's credit with its various agents, and, when the amount deposited with any particular agent was considered too high, it was Tully's duty to make some withdrawal of funds and apply them to other bank purposes; that the bank had been accustomed to make advances of money, on security, to Messrs. Railton, Sons & Leedham, of Manchester; that Tully "had a general authority from the Preston bank to draw checks upon its agents, in reducing their balances;" and that the practice, on doing so, was for Tully to fill out a printed memorandum, termed a "blue slip," showing the amount drawn and from whom, and how the proceeds were disposed of. These printed blanks were in the following form:

" Preston

Preston Banking Co.

Debit

Credit "

When such slips were filled out, Tully signed them with the letter P simply, which stood as his signature and authentication of the transaction stated in the memorandum. The blue slips were then handed to the accountant's department, from which the proper entries were made in the books of the bank, and the slips were preserved as vouchers.

The complaint charges, and the proof shows, that Tully, upon three occasions, drew checks upon the bank's agents, received the money from them, and rendered to the bank blue

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slips, crediting the drafts to the agents, and directing the debit of the amounts to certain customers of the bank. The proof warrants the inference, however, that the money was appropriated by Tully to his own use, and not invested with the persons against whom it was charged. Three transactions of this kind are mentioned in the complaint, all similar, one of which is as follows: On the 23d of October, 1882, Tully drew a check upon the Manchester and Salford Bank, Limited, for £1,000, payable to selves or bearer, signed, "Per pro. The Preston Bank'g Co., G. T. Tully, sub-manager." The drawee was one of the agents of the Preston bank. Tully received the money in person, and, on the 4th of November following, rendered to the accountant's bureau of the Preston bank the following blue slip:

"Preston, 4, 11, 1882.

The Preston Banking Company.

Debit Investment ac. to Railtons.

Credit M. & S. B'k, Man. do.

£1,000, 0, 0

P."

In October, 1883, Tully absconded. On examination of the books and accounts several leaves of the Investment Ledger were found missing, and the Railtons' account was missing. Evidence from the Railtons shows that no such moneys were received by them.

The complaint charges forgery in respect to the drafts, and also forgery in respect to the blue slips, in uttering a "certain written instrument, purporting to be an accountable receipt, acquittance and receipt for money, dated on the 4th day of November, 1882, for the sum of £1,000, purporting to be invested with Railton, Sons & Leedham."

The Commissioner held, that the crime of forgery was not made out in respect to the checks or drafts upon which the money was procured by Tully; but he has held the prisoner for forgery, on the ground that the blue slips were accountable receipts.

Forgery is defined by Blackstone as "the fraudulent making or alteration of a writing, to the prejudice of another

man's right." (4 *Black. Com.*, 248.) I have not found any more succinct or accurate definition than this. Greenleaf adds: "It may be committed of any writing which, if genuine, would operate as the foundation of another man's liability, or the evidence of his right." (3 *Greenl. on Ev.*, § 103.) In one of the latest English cases, (*The Queen v. Ritson, L. R., 1 Cr. C.*, 200,) it is defined as including "every instrument which fraudulently purports to be that which it is not;" and, in that case, it was held, that a false date inserted in a deed, by the grantor, prior to the time of its execution, for the fraudulent purpose of overreaching an intervening incumbrance, was forgery on the part of the grantor, because it was a false deed, purporting to be what it was not, namely, a deed of the date stated, designed to cut off, by means of a false date, an existing right.

As respects the checks, the evidence shows, that Tully had authority to draw them upon the bank's agents, in the precise form in which these were drawn; and there is no proof that the circumstances of the agent's accounts were not such as warranted the drafts. The act was done in his ordinary course of business; it was an act which he was authorized to do; and there was nothing false or irregular about the checks themselves. His acts in drawing these checks were, therefore, rightly held not to constitute forgery. Even if Tully had had no authority to draw these checks, they would not, according to the English law, have constituted forgery, as was held by the fifteen judges, in *Regina v. White*, (2 *Car. & K.*, 404,) because the signature by him in his own name, "per procuration," &c., showed on its face all that it purported to be, and was not a false making.

As respects the blue slips, if I were at liberty to consider the question presented as an original one, in connection with the law of evidence prevailing in this State, I should be inclined to hold that they might possibly constitute forgery at common law, on the ground that, under the usage of the bank and the course of dealing, these blue slips, as between Tully and the bank, when supplemented by his own oath, as correct

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entries made at the time of the transaction, and in the course of his official duty, might, in the absence of his own recollection, become evidence in his favor, admissible, under our rules of evidence, to show an investment by him of the moneys he had received, as stated in the slips, and hence tending to show an acquittance to him therefor, as against the bank; and that these slips were precisely equivalent to entries in the books of the bank by Tully, and of the same effect as if it had been the practice for Tully to make entries in the books of the bank, instead of rendering the blue slips to the accountant's department, for the purpose of such entries by others. Such entries in the books of the bank, in the course of his daily duties, would, in connection with his own oath, I think, afford some corroborative evidence, in themselves, as against the bank, in favor of the person making them, as parts of the *res gestæ*. (*Wharton's Crim. Law*, § 663; 1 *Greenl. Ev.*, § 118; *McGoldrick v. Traphagen*, 88 *N. Y.*, 334; *Bank of Monroe v. Culver*, 2 *Hill*, 531; *Chaffee v. United States*, 18 *Wall.*, 516, 541; *Burke v. Wolfe*, 38 *N. Y. Superior*, 263; *Conklin v. Stamler*, 2 *Hill*, 422, 428; *Biles v. Commonwealth*, 32 *Penn. St.*, 529; 1 *Taylor on Ev.*, §§ 697 to 712.) When such entries are made falsely and fraudulently, in order to conceal embezzlements, they might well, I think, under our law, be held to be forgery at common law, as papers falsely made, to the prejudice of the bank, because capable of being made use of, in connection with his own oath, as evidence against it; and the false manufacture of written evidence against another is clearly forgery. Herein, as it seems to me, lies the distinction between papers or documents capable of such a use, and others which are merely false statements, and can have no such legal effect to another's prejudice. A letter written by an agent to his principal, containing a false and fraudulent account of a business transaction, is not forgery, because it has not, and cannot be made to have, any legal force or validity, in itself, against any other person than the writer. However false its statements, it is precisely what it purports to be, and nothing else, and is not capable of any

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other.use. (*State v. Young*, 46 N. H., 266.) But, if the principal should insert in the letter an alteration injurious to the agent, the alteration would be forgery on his part, because false, and because the letter would be *prima facie* evidence against the agent. So if a check delivered in payment of goods purchased, be drawn fraudulently against a bank where the drawer has no funds, and has no reason to expect payment, such a check is not forgery, since it binds nobody but the drawer, and is precisely such as he made it and intended it to be. But, if the holder fraudulently increase the amount payable after the check has been signed, that is forgery on his part, because the check is evidence, and apparent authority for drawing an amount of money which the maker never authorized. In all these cases, the distinction seems to me to turn upon the question, whether the instrument has, or can be made to have, any legal force or effect, in itself considered, against any other person than him who makes the false statement or alteration. If it has, and is designed and calculated to deceive, it is forgery; otherwise, not. This distinction, I think, is well shown in the case of *Regina v. White*, (2 Car. & K., 404,) above referred to. There the accused was held, at *nisi prius*, guilty of forgery, for indorsing a check, "Per procuration, Thomas Tomlinson," adding his own name, upon which he drew the amount of the check, stating, at the time, that he was authorized to sign in that manner. He had, in fact, no authority to sign in that manner. On appeal before the fifteen judges, the verdict was set aside, as erroneous, on the ground, as I understand, that there was nothing in the signature that purported to be anything different from what it was, and, though the endorsement "Per pro." &c., was false, that signature was no evidence whatever against Tomlinson of any authority from him, and could not be made such, but was merely a naked false statement in writing. Entries in pass-books, on the other hand, purport to bind the parties, and are evidence of accountability for the amounts entered, and, hence, a subject of forgery. (*Reg. v. Moody*, 9 Cox's C. C., 166, 168.)

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In this case, if the blue slip was nothing more than a mere direction to the accountants to credit the agent and charge the Railtons, although it contained, by implication, a representation of the investment of the amount named with the Railtons, that would not have constituted forgery, but merely a false representation in writing. It could only become forgery by virtue of some quality, as evidence, which it might possibly acquire in Tully's favor, under the usage and practice of the bank, and the law of the place, tending to acquit him for the money which he had drawn from the agent.

For the purposes of this hearing, however, on a claim of extradition by the British Government, I am precluded from passing upon this as an original question, in connection with the rules of evidence prevailing here, because this transaction was in England, where a different rule of evidence seems to prevail, (3 *Black. Com.*, 368; *Marriage v. Lawrence*, 3 *B. & Ald.*, 142;) and also because, in a case identical with the present, as it seems to me, in all essential particulars, the Court of Appeal, in England, has held this offence not to be forgery. I refer to the case of *In re Windsor*, (6 *Best & Smith*, 522,) who, in 1835, was arrested in London on the charge of forgery upon the Mercantile Bank of this city, in making false and fraudulent entries in the books of the bank. Windsor, the paying teller of the bank, had embezzled upward of \$200,000, and concealed his crimes by entering upon the bank's books some \$200,000 as coin and cash in vault, which was not there. By these fictitious entries, carried along for a period of two years, he concealed his embezzlements. In the argument before the Court of Appeal, on *habeas corpus*, counsel called the attention of the Court to the claim that such an entry "is virtually a statement by the bank, and would be evidence against them." The point was overruled, although the rules of evidence prevailing here were not considered. Opinions were delivered by Cockburn, Ch. J., and Blackburn, J., with Shee, J., concurring. Cockburn, Ch. J., says: "No doubt this was a false entry and made for fraudulent purposes. But it is clear that the offence did not amount to forgery.

We must take the term "forgery" in the Extradition Act to mean that which by universal acceptation it is understood to mean, namely, the making or altering a writing so as to make the writing or alteration purport to be the act of some other person, which it is not." Blackburn, J., says: "Forgery is the falsely making or altering a document to the prejudice of another, by making it appear as the document of that person. Telling a lie does not become forgery because it is reduced to writing." The statute of the State of New York making the offence forgery in the third degree was held, and, no doubt, rightly, not to extend the force of the Treaty to offences not embraced within the definition of forgery at the time when the Treaty was executed. The prisoner was, accordingly, discharged. There has been no change in the laws or statutes of either country, in this respect, so far as I know, since this decision.

It is immaterial what my own judgment might be, whether, as an original question, the case of Windsor or that of Tully constitutes forgery at common law, so long as the point has been adjudicated to the contrary in England, in whose behalf the extradition is here sought. The blue slips, in this case, cannot, by possibility, have any greater effect than Tully's own entries in the books of the bank according to the usages of the bank would have had. It is only as some possible evidence in Tully's favor that such entries, or these blue slips, as the equivalent of such entries, could be anything more or different than they purport to be. The attention of the English Court of Appeal being called to this point, they overruled it, as insufficient. This adjudication must be deemed to be the settled law of England, until in some way modified or reversed, and I have not found any contrary or inconsistent adjudication. While the definitions of forgery there given are, in some respects, I think, too limited, the case of Windsor, as an authority, determines the English law, as regards forgery, in this particular. By that adjudication, Tully could not be convicted, or lawfully charged with the offence, of forgery, in respect

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to the transactions here complained of; and it would, evidently, be improper to order his extradition upon a charge which the law of that country declares cannot be maintained, as constituting forgery, under the Treaty.

The prisoner should, therefore, be discharged.

C. S. Luscomb, for Tully.

F. F. Marbury, for the British Government.

A. P. Whitehead, for the Preston Banking Company, Limited.

THE DAVIS IMPROVED WROUGHT IRON WAGON WHEEL
COMPANY

vs.

THE DAVIS WROUGHT IRON WAGON COMPANY. IN EQUITY.

The legal title to a patent will prevail over the equitable title, unless the former was acquired with notice of the latter.

Notice to individual stockholders in a corporation is not notice to the corporation, and their knowledge of facts is not notice of such facts to the corporation.

The fact that a person is a director of a corporation when it acquires a title will not charge it with the knowledge which such person has of any infirmity in its title, if such title is acquired from such person.

(Before WALLACE, J., Northern District of New York, June 20th, 1884.)

WALLACE, J. The defendant relies upon its equitable title to the patents in suit, to defeat the complainant's bill. The complainant has the legal title to the patents, having taken not only an assignment of the inventions from the Messrs. Davis, who were the inventors, but also the statutory title, the

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letters patent being issued to the complainant. The defendant claims to have succeeded to the rights of the Davis Iron Wheel Company, under an agreement made by that company with the Davises, by the terms of which the Davises covenanted to apply in the name of that corporation, its assigns or successors, for all patents for any improvements they might invent in iron wagons, or any wheeled vehicle, or any parts thereof, and to transfer any such patents which they might procure to the company, its successors or assigns. The patents in suit are for inventions made by the Davises after this agreement was executed.

As the complainant has acquired the legal title to the patents, its title must prevail over the equitable title of the defendant, unless the complainant's rights were acquired with notice of the equities of the defendant. Actual notice of these equities is not shown, but the defendant contends that the complainant is chargeable with constructive notice. The complainant was incorporated after the execution of the agreement between the Davises and the Davis Iron Wheel Company, and the Davises were two of the five incorporators. They were also two of its five directors when they assigned to it the inventions patented and when the letters patent were issued to it.

The circumstance that the Davises were promoters or associates with others in forming the corporation is not material. A corporation can have no agents until it is brought into existence, and after that it acts and becomes obligated only through the instrumentality of its authorized representatives. Stockholders cannot bind it except by their action at corporate meetings; and it is undoubted law, that notice to individual stockholders is not notice to the corporation, and their knowledge of facts is not notice of them to the corporation. (*In re Carew's Estate Act*, 31 Beavan, 39; *Fairfield County Turnpike Co. v. Thorp*, 13 Conn., 182; *The Admiral*, 8 Law Rep., N. S., 91.) Instances may occur where associates combine together to create a paper corporation, as a form or shield to cover a partnership or joint venture, and where the stock-

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holders are partners in intention. The liberal facilities offered by the statutes of many of our States for organizing such corporations are, undoubtedly, often utilized by those whose only object is to escape liability as partners, by calling themselves stockholders or directors. Where such a concern is formed, a Court of equity might treat the associates as partners in fact, disregard the fiction of a corporate relation between them, and subject the title of the property transferred to it by the promoters to any equities which might have existed as against them. If it had been shown here that the Davises formed the corporation for the purpose of transferring to it the inventions and patents which they were in equity obligated to transfer to another corporation, and that they contributed the capital and were the only persons having a substantial interest in the corporation, it might be successfully urged that the corporation would stand in no better position than they. Nothing of this, however, is in the proofs, and, in the absence of evidence, the Court cannot assume that those persons who have been associated with the Davises as corporators and stockholders have not the ordinary rights and interests of stockholders.

The question remains, whether the complainant is charged with constructive notice of the defendant's rights because the Davises were directors of the complainant at the time it acquired its interest in the inventions, and when the letters patent were issued to it. The authorities do not agree, whether a corporation is to be held cognizant of facts which have come to the knowledge of an officer or director unofficially; but, the better opinion would seem to be, that, if the officer or director is an active agent of the corporation in the transaction affected by his knowledge, it is not material how or when he acquired his information. There is no evidence here to show what took place between the Davises and the other directors or officers of the complainant in regard to the purchase of the inventions, or whether the Davises took any official part in the transactions which resulted in the issuing of the letters patent to the complainant. The defendant re-

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lies on the mere fact that they were directors when the corporation derived its title, and insists that this circumstance alone is notice to the corporation of the infirmity of the title it obtained. This is not enough. It cannot be assumed that they participated as directors when they were representing their own interests as parties contracting with the corporation; and it would be most unreasonable to charge the corporation with notice of facts within their knowledge, but which it was not for their interest to communicate to the officers or to their co-directors. They were selling to the complainant what they had already sold to another, and, if they had communicated the facts, the corporation would have purchased only a worthless title. If they had imparted their knowledge to the other directors or officers, they would have defeated the object in view. The general rule which charges a principal with the knowledge of his agent is founded on the presumption that the agent will communicate what it is his principal's interest to know and the agent's duty to impart. In the language of Mr. Justice Bradley, the rule "is based on the principle of law, that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty." (*The Distilled Spirits*, 11 Wall., 367.) The rule has no application when an agent divests himself of his fiduciary character and becomes a contracting party with his principal, because there is no reason to presume that he will impart information which it is for his interest to suppress. "When a man is about to commit a fraud it is to be presumed that he will not disclose that circumstance to his colleagues." (*Kennedy v. Green*, 3 Myl. & K., 699.) Accordingly, it has been repeatedly adjudged, that a corporation will not be charged by the knowledge of a director in a transaction in which the director is acting for himself, because he represents his own interests and not those of the corporation. (*Commercial Bank v. Cunningham*, 24 Pick., 270, 276; *Housatonic & Lee Banks v. Martin*, 1 Met., 308; *Winchester v. Balt. & Sus. R. R. Co.*, 4 Md.,

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239; *Seneca Co. Bank v. Neass*, 5 *Denio*, 337; *La Farge Fire Ins. Co. v. Bell*, 22 *Barb.*, 54; *Terrell v. Branch Bank of Mobile*, 12 *Ala.*, 502.)

As the defendant has failed to show that the complainant's title is affected by notice of the facts upon which the defendant's equities rest, the complainant is entitled to a decree.

Duell & Hey, for the plaintiff.

John A. Reynolds, for the defendant.

CATHERINE L. EDWARDS

vs.

THE TRAVELLERS' LIFE INSURANCE COMPANY.

Clear evidence that a person died from poison is not furnished by the fact that, after death, prussic acid was found in his stomach, without evidence that there was enough to produce death.

If he died from poison, it must be shown that he took it knowingly, in order to make out a case of suicide.

A mistake in ruling as to the order of proof is cured if the lacking proof is afterwards given.

A new trial will not be granted because one party offered in evidence a paper which the other party should have offered.

Requirements in a policy of life insurance as to giving notice of death may be waived by the insurer, and are waived when the agent of the insurer misleads the assured.

(Before COXE, J., Northern District of New York, June 27th, 1884.)

COXE, J. This action is upon a policy of life insurance. At the January Circuit, the plaintiff had a verdict. The defendant now moves for a new trial.

On the trial, the principal contention had reference to the defence of suicide. The defendant succeeded in proving that the insured died in circumstances peculiar and suspicious in many of their aspects. The precise cause of death was left to conjecture. Stated as strongly for the defendant as the evidence warrants, the facts were, perhaps, sufficient, had the jury adopted the defendant's theory, to justify them in the presumption that the insured took his own life. They did not so find, and their verdict must be regarded as conclusive upon this issue.

It is insisted that the Court should have charged, as requested, that the evidence was clear and positive that the insured committed suicide. I cannot adopt this view. The evidence was not clear and positive. The insured might have died from the effects of poison, and he might have died from apoplexy produced by excessive heat. The defendant proved, that, ninety-six hours after death, prussic acid was found in his stomach. Whether there was enough to produce death could only be presumed. No quantitative test was made.

Assuming, however, that he died from prussic acid poisoning, there was no evidence as to how it was taken, or that it was taken knowingly. But, it is argued, that, whether taken ignorantly or designedly is wholly immaterial, and that the Court fell into error in charging the jury that, in order to reach a verdict for the defendant, they must find not only that there was poison sufficient to cause death, but also that the insured took it knowingly and not by mistake. No authority is produced sustaining this position, which seems wholly at variance with justice and common sense. Test it by an illustration. A sportsman is shot to death by the accidental discharge of his own fowling-piece; a woodman is killed by the premature fall of a tree which he himself has felled; an infectious cut from his own scalpel causes the death of an anatomist. Strictly speaking, each dies by his own hand; but, can it be seriously maintained, that a life-policy, providing that it shall be void if the insured "shall die by suicide, whether the act be voluntary or involuntary," would be

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avoided in such circumstances? No Court has yet enunciated a doctrine so untenable, and it is believed none ever will. Life insurance is intended to cover just such risks. Its chief benefits are found in cases of sudden death. But, the precise question was determined by the Court of Appeals, in *Penfold v. Universal Life Ins. Co.*, (85 *N. Y.*, 317.)

The plaintiff offered in evidence a receipt for the first annual premium, but, relying on certain admissions of the answer, did not produce the policy of insurance. The defendant objected to the receipt, unless read in connection with the policy, and the refusal of the Court to so rule is alleged as error. The answer is two fold—first, it was not incumbent on the plaintiff, under the pleadings, to produce the policy; and, second, the question at best relates only to the order of proof. As the policy was subsequently offered and the jury properly instructed as to the burden of proof, the mistake was cured, assuming that there was a mistake.

A new trial will hardly be granted because the defendant offered in evidence a paper which the plaintiff should have offered.

It is also argued that there was a fraudulent concealment of certain facts by the plaintiff, and that the Court should have so declared. Regarding this proposition it is sufficient to say, that all the evidence there was upon this subject—and there was but little—was submitted to the jury, with instructions as favorable to the defendant as it could fairly ask.

The other defences are of a formal and technical character, and relate to the alleged failure of the plaintiff to give immediate notice in writing of the death of the insured, and to furnish proofs of death in accordance with the strict letter of the contract. No attempt will be made to conceal the fact that such defences do not commend themselves to the Court. They in no way involve the merits, and it is not easy to see how the omissions referred to injured the defendant or impaired any of its rights. True, the parties entered understandingly into the agreement, and, if the Court is clearly satisfied that it has been violated, even in an apparently unimportant particular,

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it should so say. But, where a life insurance company seeks to avoid the sacred obligation which it has assumed, because, for instance, a fact is communicated to it orally instead of in writing, the Court should be very sure of the rectitude of such a defence, before permitting it to succeed. These policies are prepared with great care, by those in the company's employ, they are surrounded by agreements and warranties innumerable—a labyrinth of conditions, where one heedless or uninformed may easily go astray. To construe these contracts narrowly and illiberally is not the policy of the Courts. A strict construction would often work injustice to both parties alike—to the insured, by permitting non-essentials to defeat an equitable claim; to the insurer, by shaking the confidence of the people in the system of life insurance.

The condition here alleged to have been violated is in these words: "That, in the event of the death of the person insured, then the party assured, or his or her legal representatives, shall give immediate notice, in writing, to the company, at Hartford, Conn., stating the time, place and cause of death, and shall, within seven months thereafter, by direct and reliable evidence, furnish the company with proofs of the same, giving full particulars, without fraud or concealment of any kind." The facts were as follows: The insured died June 19th, 1882. A day or two afterwards, E. M. Phillips, who is described, in the receipt referred to, as "agent of this company at Southbridge, Mass.," met one of the family of the deceased on the street, and informed him that he was going to Hartford, and would give the company the requisite notice and procure the necessary blanks for the proofs of death. He did go to Hartford, on or about the 21st of June, saw the secretary of the company, gave him notice of the death, stating all the particulars which he then knew, and obtained the blank proofs. On his return, he handed the blanks to one of the plaintiff's representatives, saying, at the time, "When you get them completed, I want you to return them to me." They were filled out and delivered to him July 3d, 1882. He retained them for several months, and then returned them to a

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brother of the plaintiff, saying that they were incomplete, and demanded additional information. On the 29th of January, 1883, they were again delivered to Phillips, and by him sent to the company, on or about the 7th of February. The company, in acknowledging their receipt, made no objection that they were received too late, and retained them in its possession. They were produced on the trial, by the defendant's counsel.

It must be held, that, if the plaintiff has not followed the contract literally, in these particulars, it was because she was misled by the course of the defendant, and that the defendant is not now in a position to take advantage of the plaintiff's omissions, having waived a strict performance of the contract.

I have examined the other exceptions argued, but do not think any of them well taken.

The motion for a new trial is denied.

William F. Cogswell, for the plaintiff.

Henry M. Field, for the defendant.

HIRAM H. THAYER

vs.

WILLIAM H. HART, JR., AND OTHERS. IN EQUITY.

Where the plaintiff's patent antedates the defendant's, the defendant must prove, beyond a reasonable doubt, that his was the prior invention. When that is done, the plaintiff must show, by proof as convincing, that his invention preceded the defendant's. The evidence must be clear, positive and unequivocal, leaving nothing to speculation or conjecture.

(Before COXE, J., Southern District of New York, June 28th, 1884.)

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COXE, J. The complainant is the owner of letters patent No. 202,673, dated April 23d, 1878, for an "improvement in neck-tie shields." The application was filed December 20th, 1877. The defendants are the owners of letters patent No. 220,610, dated October 14th, 1879, for a similar invention. Their application was filed August 28th, 1879. Both patents are designed to secure a pin formed with a shoulder, and so constructed that it may be conveniently and firmly attached to a neck-tie shield without using any device for the purpose of fastening except the pin itself. The only difference, so far as the pin in question is concerned, irrespective of the method of attaching it, is, that in complainant's device the upper end of the pin is turned away from the point, and in defendants' it is turned towards the point. The principal controversy relates, therefore, to the question of prior invention. The complainant's patent antedating the defendants', it was incumbent upon them to prove, beyond a reasonable doubt, that theirs was the prior invention. This they have done by proof so positive that the complainant's counsel conceded, on the argument, that the date of their invention was January 15th, 1877, eleven months prior to the filing of the complainant's application. This date being fixed, the burden was transferred to the complainant, to satisfy the Court, by proof as convincing as that required of the defendants, that his invention preceded theirs. The rule in such cases is very strict. It is so easy to fabricate or color evidence of prior invention, and so difficult to contradict it, that proof has been required which does not admit of reasonable doubt. Where interests so vital are at stake, where intervening years have made perfect accuracy well nigh impossible, where an event, not deemed important at the time, has been crowded from the memory and obscured by the ever varying incidents of an active life, it is not difficult to imagine that even an honest man may be led erroneously to persuade himself that the fact accords with his inclination concerning it. The evidence of prior invention is usually entirely within the control of the party asserting it, and, so wide is the opportunity for deception, artifice, or

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mistake, that the authorities are almost unanimous in holding that it must be established by proof clear, positive and unequivocal. Nothing must be left to speculation or conjecture.

In *Coffin v. Ogden*, (18 *Wallace*, 120,) Mr. Justice Swayne says: "The invention or discovery relied upon as a defence must have been complete, and capable of producing the result sought to be accomplished; and this must be shown by the defendant. The burden of proof rests upon him, and every reasonable doubt should be resolved against him."

In *Webster Loom Company v. Higgins*, (15 *Blatchf. C. C. R.*, 456,) the Court says: "The burden of proof rests upon the defendants, to show, beyond any fair doubt, the prior knowledge and use set up; but, where they have sustained that burden by showing such knowledge and use prior to the patent, the burden of showing the still prior invention claimed, by at least a fair balance of proof, must rest upon the plaintiff."

In *Wood v. Cleveland Rolling Mill Co.*, (4 *Fisher*, 550,) the Court, referring to the witnesses called to establish prior invention, says, at page 560: "Their imagination is wrought upon by the influences to which their minds are subjected, and beguiles their memory. When the defence is made, it is the duty of Courts and juries to give it effect. But, such testimony should be weighed with care, and the defence allowed to prevail only where the evidence is such as to leave no room for a reasonable doubt upon the subject."

In *Howe v. Underwood*, (1 *Id.*, 160,) Judge Sprague, at page 175, says: "How invariable is it, that, after a great invention has been brought before the world, has become known to the public, and been put in form to be useful, people start up in various places and declare that they invented the same thing long before." "After having seen what has been done, the mind is very apt to blend the subsequent information with prior recollections, and confuse them together. Prophecy after the event is easy prophecy."

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Within the rule thus established, the question to be answered here is: Has the complainant satisfied the Court, beyond a reasonable doubt, that he conceived his invention prior to January 15th, 1877? After making every allowance for the inexperience of some of the complainant's witnesses, several of them being young women called for the first time to the witness stand, it must be said, that his evidence is involved in such contradiction, uncertainty and confusion, that he has failed to bring himself within the rule above adverted to. The complainant fixes the middle of October, 1876, as the time of his invention. The circumstances which, among others, lead him to do so are as follows: During his absence at the Centennial Exhibition, in October, on which occasion his wife and child accompanied him, the firm of Hubbs & Klein left an order with his forewoman for five gross of "Chancellor shields," with pins attached. On his return, in order to avoid the expense of purchasing the pins then in the market, he commenced experimenting with a common pin, and, in connection with Albert M. Smith, succeeded in making the patented invention. A shield and pin precisely like the defendants' device, alleged to have been made shortly after this time, was produced in evidence. In the latter part of the same month, or early in November, another order for similar shields and pins was filled for the same firm, and also one for Anson Pitcher, of Boston. The pliers and other tools used in bending and fastening the pins, and a memorandum book of one of the work-women, in which appears an entry in the complainant's hand-writing, under date of October 28th, 1876, alleged to refer to the "Chancellor shields" in question, were also exhibited to the Court.

The witnesses are further enabled to locate the date of the invention by the circumstances, first, that it occurred a short time prior to the complainant's removal of his place of business from Walker street to Centre street, and very soon after some fans, known as "Centennial fans," were finished. Though these are the salient features, there are several other circum-

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stances which tend to corroborate the complainant in fixing upon October, 1876, as the time when the idea of the patented pin first entered his mind. But, the defendants have succeeded in contradicting or casting suspicion upon each one of the principal transactions which the complainant has grouped around his invention, as forming the data by which he locates the time. It is shown, for instance, that he visited the exhibition at Philadelphia, with his wife and child, in August and not in October. It must, therefore, be said, either that the invention was not immediately after that visit, or that it was not in October, and it is difficult to reconcile either conclusion with the other testimony. Being recalled, the complainant testified that he again visited Philadelphia in October, but he went alone and was there but a single day. This could hardly have been the occasion referred to by the witness Cordelia White, as her recollection relates to the former rather than the latter visit.

The defendant also offered evidence proving or tending to prove the following facts: that, although Hubbs & Klein were associated together in business, no partnership between them ever existed; and that the October order referred to was never given, and no entry thereof appears upon the complainant's books for 1876, notwithstanding the fact that it is alleged to have been given in circumstances which would ordinarily require an entry to be made. Indeed, no mention is made, in the ledger of 1876, of Hubbs & Klein, either as a firm or as individuals, and there is no entry, either that year or the next, of which it can be positively asserted that reference is made to the patented pin. The books do show, however, that, for a year and more after the alleged invention of this cheap and simple device, the complainant purchased of the defendant Hart large quantities of a much more expensive pin, and a few days before he bought 25 gross of "barrel pins," and a pair of pliers for attaching them to the shields. There are circumstances which strongly connect these pliers with the pair produced by the complainant.

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No satisfactory evidence is offered that the shields sent to Anson Pitcher had pins of any kind attached.

The proof leaves little room for doubt that the removal to Centre street did not take place until November, 1877. In addition to the complainant's letter strongly pointing to this date, bills emanating from his establishment are produced, dated from Walker street as late as October 13th, 1877, and from Centre street November 10th, 1877. There is, certainly, a strong presumption, in the absence of direct proof, that in October the complainant was at Walker street and in November at Centre street.

These circumstances, taken in connection with the testimony that the invention was conceived just before removing, and that the patented pin was first manufactured after the removal, furnish very persuasive evidence that the invention was in the fall of 1877 instead of the fall of 1876. The witnesses were testifying to events which took place six and seven years before. They certainly are mistaken as to some of them. Why may they not, without any wrongful intent, have mistaken the year also?

It is not thought necessary to enter upon a more extended review of the evidence, which is very voluminous and is discussed with great care and elaboration upon the briefs presented. It is enough to say, that no one of the principal circumstances relied on by the complainant is free from perplexity. Either its own date is uncertain, or there is difficulty in connecting it with the invention. It would be idle to assert that all this does not create the doubt which the authorities hold must be absent from the mind of the Court.

This result has been reached without reference to the declarations or admissions of the joint inventor, Albert M. Smith, either in writing or otherwise.

It follows, that the bill must be dismissed, with costs.

Josiah P. Fitch, for the plaintiff.

Frederic H. Betts and *C. Wyllys Betts*, for the defendants.

The Hadji.

THE HADJI.

Goods were shipped by a vessel, under a bill of lading containing this provision: "No damage that can be insured against will be paid for." The goods were damaged because of the faulty construction of the ballast tank of the vessel; and, having been insured, the loss was paid before the filing of the libel: *Held*, that the exemption was not to be construed as an exemption from liability for the negligence.

(Before WALLACE, J., Southern District of New York, July 1st, 1884.)

THIS was a libel *in rem*, filed in the District Court. After a decree for the libellants, (16 *Fed. Rep.*, 861 and 18 *Id.*, 459,) the claimants appealed to this Court.

Sidney Chubb, for the libellants.

Wilhelmus Mynderse, for the claimants.

WALLACE, J. The proofs show satisfactorily that the libellants' merchandise was injured by the sea water which entered the hold of the Hadji through the seams of the ballast tank, owing to the faulty construction of the tank. The top of the tank was not made sufficiently rigid; its motion removed the heads of the rivets which fastened the seams between the several plates of iron forming the top; and the water from the tank entered by the opened seams.

The goods were shipped under a bill of lading containing various restrictions of liability on the part of the carrier, among which was the following: "No damage that can be insured against will be paid for." Insurance was effected by the libellants in two marine insurance companies, and, before the libel herein was filed, the insurers paid to the libellants the loss arising from the injury to the goods.

If the condition relieving the carrier from liability for "any damage that can be insured against" is to receive an unqualified construction and be deemed to include a loss arising

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by the negligence of the carrier, it is obnoxious to public policy, and, therefore, void, according to the authorities which are controlling upon this Court. The law, as tersely stated in *Noy's Maxims*, (p. 92,) "If a carrier would refuse to carry unless a promise were made to him that he shall not be charged with any miscarriage, that promise were void," is the rule of the Federal Courts. He may stipulate, however, for such a reasonable modification of his common law liability as is not inconsistent with his essential duties to the public; he may absolve himself from responsibility as an insurer against accident or misfortune; but he cannot exempt himself from the consequence of his own negligence or that of his employees. Public policy demands that the right of the shipper to absolute security against the negligence of the carrier, and of all persons engaged in performing his duty, shall not be taken away by any arrangement or agreement between the parties to the service. (*York Co. v. Central R. R.*, 3 Wall., 107; *R. R. Co. v. Lockwood*, 17 Wall., 357; *Bank of Kentucky v. Express Co.*, 93 U. S., 174.)

The same reasons that forbid the recognition of an express contract between the carrier and the shipper, exempting the former from liability for his own negligence, forbid a contract between them which is designed to work out the same result. That which cannot be done directly will not be permitted to be done indirectly. If the carrier may refuse to carry unless the shipper will look to some other party in case of miscarriage, the result is the same, and the consequences to the public are the same, as though he refused to carry at all unless upon his own terms as to liability. In this view, it is quite immaterial, under such a stipulation as is contained in the bill of lading, whether the shippers can or cannot obtain insurance which will protect them from loss by the carrier's negligence, or whether the libellants actually did obtain such insurance. It suffices that the carrier cannot divest himself of his own responsibility for negligence, by requiring the shipper to protect himself against it; and that an agreement having this operation is void.

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Authorities are cited holding that the carrier may, by stipulation in his contract, reserve to himself the benefit of any insurance which the shipper may have effected upon the goods; and thus, although the loss might arise from his misconduct, may secure the indemnity taken by the shipper. These authorities fall short of the point. It is one thing to sanction a contract by which a carrier is permitted to indemnify himself against loss out of a fund which the shipper has received or may receive on account of the loss, and another to sanction one which requires the shipper to obtain such a fund as a condition of the carrier's undertaking, or which absolves the carrier from liability in default of obtaining the fund.

Rintoul v. New York Central Co., (21 Blatchf. C. C. R., 439,) was a decision of this Court. The bill of lading contained a clause providing that, in case of loss or damage to the property transported, whereby any legal liability might be incurred, the carrier should have the full benefit of any insurance that might have been effected on the property by the shipper. The learned Judge who decided that case placed the right of the carrier to enforce such a stipulation upon the ground that the shipper was under no obligation to insure, and the stipulation was not, therefore, one in effect to exempt the carrier from liability. He states: "If it was a part of the bill of lading that the owner must insure for the benefit of the carrier, such condition would be unfair." This observation applies to the contract which was sustained in the case of *Phoenix Ins. Co. v. Erie & Western Co.*, (10 Biss., 18,) and to that in the case of *Carstairs v. Mechanics' & Traders' Ins. Co.*, (18 Fed. Rep., 473,) where a similar stipulation was held valid.

It is true, as all these cases assume, that a common carrier may make a valid contract of insurance for protection against the consequences of his own negligence. He is under no higher obligation towards the insurer not to be careless than is any other party who desires insurance; and one of the

The Hadji.

principal objects contemplated by the contract of insurance is the protection against loss to the assured of which the primary cause may be his negligence or that of his agents. (*Angell on Insurance*, § 125.) This being so, it does not seem unreasonable to hold the shipper to the contract he has seen fit to make with the carrier. But, it is quite another thing to permit a carrier to compel the shipper, as a condition for the transportation of his goods, to enter into an independent contract with a third party, for the carrier's benefit, in order that the latter may escape loss arising from his own misconduct. It may be that, when the carrier insures himself, he will charge the shipper a higher price for carrying his goods, while, if the shipper agrees to insure for the carrier's benefit, he may get a lower rate from the carrier; but the objection to the condition lies in its tendency to impose upon the shipper the burden of protecting himself against a risk which it is the carrier's duty to assume, and which the law will not permit him to evade. The only effect that can be given to the stipulation here is, by construing it as exempting the claimants from liability for any damage that the shipper could insure against, not arising from the carrier's own negligence. (*York Co. v. Central R. R.*, 3 Wall., 107; *Bank of Kentucky v. Express Co.*, 93 U. S., 174.) And, in the Courts of this State, where it is held that carriers may, by express contract, exempt themselves from liability arising from their own negligence, the rule is, that, when the general words may operate without including the negligence of the carrier or his servants, it will not be presumed that it was intended to include such negligence in the exemption. (*Wells v. Steam Nav. Co.*, 4 Selden, 375; *Steinweg v. Erie Railway Co.*, 43 N. Y., 123.) In the case of *Mynard v. Syracuse, &c., R. R. Co.*, (71 N. Y., 180,) the contract released the carrier from "all claims on account of any damage or injury to the property from whatsoever cause arising;" but it was held that the exemption did not include an injury arising from the carrier's negligence.

It is the first duty of a common carrier by water to pro-

The Bristol.

vide a vessel tight, staunch, and fit for the employment for which he holds it out to the public. (*Angell on Carriers*, § 173.) The breach of this duty is the personal default of the vessel owner. (*Lyon v. Mells*, 5 *East*, 428.) The loss sustained by the libellants, therefore, arose from the carrier's own negligence.

The other points urged by the appellants as a defence to the action are not of sufficient merit to require consideration.

The decree of the District Court is affirmed, with interest and costs.

THE BRISTOL.

A libel *in rem* against a vessel, for a collision, was filed more than four years after the collision, while it was owned by a company which had bought it for a valuable consideration, without notice, twenty-three months after the collision, the vessel having been open to libel at all times before the sale. *Held*, that the lien had been lost.

(Before WALLACE, J., Southern District of New York, July 1st, 1884.)

WALLACE, J. The Court below properly dismissed the libel in this case because of the laches of the libellant in not asserting its claim seasonably. The collision took place July 5th, 1872. The Bristol at that time was owned by the Narragansett Steamship Company. June 8th, 1874, that company sold the steamer to the Old Colony Steamship Company, the present owner. During this period of nearly two years that intervened between the time of the collision and the sale of the steamer, the Bristol could have been libelled at any time. The Old Colony Steamship Company was not only an innocent purchaser for a valuable consideration, but its officers

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took unusual precautions to ascertain whether there were any claims asserted against the steamer, by examining the records of all the Admiralty Courts which might acquire jurisdiction *in rem*, and, for several months after it took possession and exercised notoriously the rights of an owner, it retained control of a fund as a security in its hands against any latent liens upon the vessel. The libellant did not assert any claim so as to reach the knowledge of the purchaser, until more than four years had elapsed after the collision; and, in the meantime, the Narragansett Steamship Company had become practically defunct and was represented by its officers to be irresponsible.

Admiralty denies the privilege of enforcing a lien which has been suffered to lie dormant without excuse until the rights of innocent third persons would be prejudiced if it should be recognized. The application of the rule to this case is eminently just, and the opinion of the District Judge is fully approved. (11 *Fed. Rep.*, 156.) In this view, it is unnecessary to consider whether the Bristol was culpable in the collision.

Welcome R. Beebe, for the libellant.

William G. Choate, for the claimant.

HARRIET J. SMITH *vs.* GEORGE S. BAKER.

Negligently imparting a contagious disease is actionable.

In such a case, damages cannot be given for anything which the plaintiff might have avoided, by the exercise of the reasonable care of a prudent person.

(Before WHEELER, J., Southern District of New York, July 5th, 1884.)

WHEELER, J. The defendant took his children, when they had whooping-cough, a contagious disease, to the boarding-house of the plaintiff to board, and exposed her child, and children of other boarders, to it, who took it. The jury have found that this was done without exercising due care to prevent taking the disease into the boarding-house. She was put to expense, care and labor in consequence of her child's having it, and boarders were kept away by the presence of it, whereby she lost profits.

Words which import the charge of having a contagious distemper are, in themselves, actionable, because prudent people will avoid the company of persons having such distemper. (*Bac. Abr., Slander, B, 2.*) The carrying of persons infected with contagious diseases along public thoroughfares, so as to endanger the health of other travellers, is indictable as a nuisance. (*Addison on Torts, § 297; Rex v. Vantandillo, 4 M. & S., 73.*) Spreading contagious diseases among animals by negligently disposing of, or allowing to escape, animals infected, is actionable. (*Addison on Torts, Wood's Ed., § 6, note; Anderson v. Buckton, 1 Str., 192.*) A person sustaining an injury not common to others, by a nuisance, is entitled to an action. (*Co. Litt., 56a.*) Negligently imparting such a disease to a person is clearly as great an injury as to impute the having it; and negligently affecting the health of persons injuriously as great a wrong as so affecting that of animals.

It is objected, that the jury may have awarded damages for what the plaintiff might have prevented by sending the children away. But the jury were instructed not to give damages for anything that the plaintiff might, by the exercise of the reasonable care of a prudent person, have avoided; and it is not to be presumed that they did. The evidence was somewhat conflicting, but it does not appear that any of the findings are without evidence to support them, or are against the substantial weight of evidence, nor that the jury were actuated by any improper motives. There must be, therefore, a judgment for the plaintiff on the verdict.

Ladd v. Mills.

The motion for a new trial is overruled, and the stay of proceedings is vacated.

Francis S. Turner, for the plaintiff.

Wheeler H. Peckham, for the defendant.

WALTER G. LADD, AS TRUSTEE, &C.

vs.

SAMUEL H. MILLS AND OTHERS. IN EQUITY.

The two owners of a patent assigned to L. all their interest in it, in trust to sell rights and grant licenses for certain territory, at a specified price; to sell rights and grant licenses for other territory, on their request, and on terms they should name; to collect the proceeds, and, after deducting expenses and commissions, divide them equally among the two owners, their executors, administrators, or assigns; and, on request, to carry on suits. One of the assignors owned the exclusive right for certain territory, the other for certain other territory, and as to other territory they were joint-owners. The effect of the assignment was to make L. an agent having a power coupled with an interest. It operated to suspend the power of alienation for a period longer than the two lives of the assignors: *Held*, that the statute of New York prohibiting perpetuities did not apply to the case, because the assignors could at any time, with L., transfer the whole property, and could revoke at any time the powers of L., on tendering to him his commissions.

(Before WALLACE, J., Southern District of New York, July 7th, 1884.)

WALLACE, J. At the hearing of this cause the question was reserved for further consideration, whether the complainant acquired title to the letters patent granted to Clements and Fowler, under the trust assignment to him executed by the owners of the patent.

It is insisted, for the defendants, that the trust estate created by the assignment is void, because the absolute ownership of the patent is suspended for a longer period than two lives in being, and, as the main intent and object of the assignment is thus to suspend illegally the power of alienation, the assignment is inoperative. If no efficacy can be given to the assignment without sanctioning a prohibited trust, the complainant's title is null.

As the trust was created, and its objects are to be carried out, in this State, the defendants' position, that the validity of the transfer is to be tested by the rules of the local law, is correct. The laws of this State prohibit the suspension of the power of alienation of both real and personal property, by any limitation or condition whatever, for a longer period than during the continuance, and until the termination, of not more than two lives in being at the date of the instrument containing such limitation or condition. The statutes use the term "power of alienation," in reference to real estate, and "unqualified ownership," in reference to personal property, in prohibiting perpetuities, but the meaning of the terms is synonymous. (*Gott v. Cook*, 7 *Paige*, 542; *Everitt v. Everitt*, 29 *N. Y.*, 71.)

The trust assignment by which the letters patent were transferred to the complainant is an indenture, by the terms of which Fowler and Burrows, as parties of the first part, sell and assign to the complainant, as party of the second part, all their interests in the patent, to be held and owned by him, not for his own benefit, but as trustee upon certain enumerated trusts. These trusts may be summarized as follows: 1. To sell rights, and grant licenses, in and under the patent, for any State or Territory, (excepting certain specified States,) upon any *bona fide* application made to him therefor, at a price equal to one dollar and fifty cents for each one thousand inhabitants of the State or Territory, according to the last official census of the United States; 2. To sell rights, and grant licenses, for all the excepted States, upon the joint request of the parties of the first part, and upon such terms as they signify;

3. To collect all moneys and royalties accruing from sales and licenses, and at stated times divide the same, after paying disbursements and commissions, into two equal parts, and pay over one part to Fowler, or his executors, administrators or assigns, and the other part to Burrows, or his executors, administrators or assigns; 4. Upon the request of either of the first parties, but not otherwise, to institute, carry on, and defend suits and proceedings to protect the patent and the interests vested in him, or to enforce or annul any license or sale. By further conditions of the instrument, the parties provide for the selection of a successor in the trust of the complainant, in case of his resignation or death; the first parties covenant to save the second party and his successors harmless from all loss and liability by reason of the execution of the trust; and the second party covenants to faithfully discharge the duties of the trust. The instrument also provides for the continuance of the trust during the unexpired term of the letters patent; and each of the parties of the first part covenants, that, before he sells the rights and interest which he has in the trust created by the instrument, he will offer the same to the other, his executors or administrators, upon the terms upon which he proposes to sell.

From the recitals in the instrument, it appears, that Fowler owned the exclusive interest in the patent for certain territory, and Burrows owned the exclusive interest for certain other territory, while as to still other territory they were joint-owners; and, upon reading the whole instrument, it is quite apparent, that it was designed to restrict the power of either to deal with his exclusive interest to the prejudice of the other, and to effect a community of interest in the whole property. With this view, a third person was selected as trustee, and invested with the title of each, for the joint use and benefit of both. Each put it beyond his power to sell rights or grant licenses in his own territory, but authorized the trustee to do so on specified terms; while in the territory which they owned jointly the trustee was authorized to sell rights and grant licenses only upon their joint request. The

legal effect of the instrument was to make the complainant their agent, his powers being coupled with an interest, to carry out their joint instructions. Some of these instructions were given in advance, so that neither one of the parties could revoke them ; and as to these he had full power to act. Others were reserved ; and as to these he was only to act upon their joint consent.

The instrument is, undoubtedly, effectual to prevent either of the parties of the first part from transferring any interest in the legal title to the patent, during the unexpired term of the patent, to third persons, and, in the event of the death of either party, to prevent his legal representatives from doing so ; and to this extent it operates to suspend the power of alienation for a period longer than the two lives of the parties who created the trust.

Such a restriction upon the right of the joint-owners to deal with their property is not objectionable, and the statutes prohibiting perpetuities have no application to the case. These statutes, which add some qualifications to the rule at common law, relate only to future estates. The prohibition upon suspending the absolute ownership of personal property for a longer period than during two lives in being is directed to the accumulation of interest and income upon trusts in expectancy. The power of alienation can only be suspended when there are no persons in being by whom an absolute title to the property can be transferred. It is suspended when it cannot be exercised. It may be suspended by the creation of future contingent estates which are not to vest within the prescribed period, or by the creation of a trust for beneficiaries who cannot join with the trustee in a conveyance which will not be in contravention of the trust. But, unless a future estate, contingent or in trust, is created, the power of alienation is not suspended, because an unqualified title can be transferred at any time when the persons in being choose to join in a conveyance of their several legal or equitable interests. No such estate was created here by the trust agreement, because no persons had any interest in the trust, present or ex-

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pectant, except the persons who created it for their own benefit. It is competent for them at any time to join with the trustee and make a valid transfer of the whole property in the patent. Moreover, the trustee is merely their agent to carry out their joint instructions; and, upon tendering him any commissions to which he may be entitled, Fowler and Burrows can at any time revoke his powers, so far as they have not been executed, and insist upon a transfer of the legal title to the patent.

A decree is ordered for the complainant.

Rodman & Adams, for the plaintiff.

Bartlett, Wilson & Hayden, for the defendants.

CHARLES F. BRUSH AND THE BRUSH ELECTRIC LIGHT COMPANY

vs.

C. HARRISON CONDIT AND OTHERS. IN EQUITY.

In a suit in equity on two patents, the testimony being closed as to one, and the cause set down for hearing, if the plaintiff desires to discontinue the suit as to that patent, he will be allowed to do so on the condition, to be inserted in the decree, that the evidence taken by the defendant in relation to that patent may be stipulated into any future suit upon the same patent by the plaintiff against the defendant.

Re-issued letters patent granted to Charles F. Brush, May 20th, 1879, for an improvement in electric lamps, known as the "clamp patent," the original patent having been granted May 7th, 1878, considered.

Where only one article like the patented invention was made before, but it was used for two months and a half, publicly and practically, in ordinary

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work, with reasonable success, it was held to anticipate the patented invention.

(Before SHIPMAN, J., Southern District of New York, July 12th, 1884.)

SHIPMAN, J. This is a bill in equity, brought by the owner and the exclusive licensee of two letters patent to Charles F. Brush, one, granted October 23d, 1877, for an improvement in illuminating points for electric lights, and known as the carbon patent, and the other, re-issued May 20th, 1879, having been originally granted May 7th, 1878, for an improvement in electric lamps, and known as the clamp patent, charging the defendants with the infringement of each patent. The bill was filed December 3d, 1880. The defendants were charged with infringing the second claim of the carbon patent, and the eight claims of the clamp patent, except the fourth and the eighth.

Testimony was taken and closed on both sides in respect to the carbon patent, but the plaintiffs, after the cause was set down for hearing, gave notice to the defendants that they would move for leave to discontinue so much of the bill as relates thereto. The decree should be for a dismissal, upon the plaintiffs' motion, of so much of the bill as relates to said patent, with costs. As this does not amount, under the practice in the Federal Courts, to a dismissal upon the merits, (*Badger v. Badger*, 1 *Cliff.*, 237,) the decree should contain the condition, that the evidence taken by the defendants in relation to the patent may be stipulated into any future suit upon the same patent by the plaintiffs against the defendants or the company which has defended this suit.

The preparation of the case relating to the clamp patent was made on both sides with great and exhaustive care and learning, and at large expense, and, as a result, the issues were much simplified by the disclaimers which the plaintiffs filed during the progress of the testimony and which will be hereafter recited.

An automatic electric arc lamp first establishes an electric arc, and then, as the electrodes are consumed, regulates the

arc by automatically controlling the distance between the carbons, or rather by enabling the strength of the current and the length of the arc to mutually control each other. The automatic lamps which contain this principle of the mutual control of the length of the arc and the strength of the current are divided, says Mr. Pope, one of the defendants' experts, into two classes. "In the first class, a positive motion of one or both of the electrodes, causing them to approach or recede from each other, as the case may be, is derived from clock-work mechanism, impelled by a spring or its equivalent; the direction of the motion to be communicated to the electrodes being determined by the greater or less attractive force of an electric-magnetic apparatus included in the electric circuit of which the luminous arc forms a part. In the second class, the clock-work, or other extraneous power, is dispensed with, and the necessary movements are effected solely by the action of the electric current itself. The electrodes tend to move towards each other at all times, under the influence of a constant force, usually that of gravity, although a spring is employed in some cases. This tendency is opposed by the electro-magnetic action, which tends to resist the movement of the electrodes towards each other and to separate them. These opposing forces are designed to be in equilibrium when the electrodes are at a proper distance from each other to produce the maximum development of light with a given electric current."

In this general state of the art, Mr. Brush was an original inventor of mechanism belonging to the second of these two classes, and thought that his invention was exhibited in two forms which are described in the original and re-issued patents and are respectively shown in the drawings 1 and 6.

So much of Figure 1 as is important in this connection was constructed as follows: A helix of insulated wire, the helix being in the form of a tube or hollow cylinder, rests upon an insulated plate. An iron core, and the carbon holder which passes loosely through the core, are within the cavity of the helix. The core is made to move very freely within

this cavity, and is partially supported by springs. Just below the core is a ring of metal surrounding the carbon holder and resting upon a floor or support. One edge of the ring is over a finger or lifter, which is attached to the core, while the opposite edge of the ring is a short distance below the crown of an adjustable set screw. Quoting now from the descriptive part of the specification of the re-issued patent, which is substantially identical with the corresponding portion of the original, and omitting only the letters, where they can be omitted: "The core, by the force of the axial magnetism thus created, is drawn up within the cavity of the helix, and, by means of the finger, it lifts one edge of the ring, until, by its angular impingement against the rod, it clamps said rod and also lifts it up to a distance limited by the adjustable stop. While the ring retains this angular relation with, and impingement against, the rod, said rod will be firmly retained and prevented from moving through said ring. The adjustable stop is fixed so that it shall arrest the lifting of the rod when the carbons are sufficiently separated from each other. While the electric current is not passing, the rod can slide readily through the loose ring and the core, and it will be readily seen that, in this condition, the simple force of gravity will cause the carbon, F, to rest down upon the carbon, F', thus bringing the various parts of the device into the position of closed circuit. Now, if a current of electricity is passed through the apparatus, it will instantly operate, as just explained, to lift the rod and thus separate the carbons and produce the electric light. * * * * As the carbons burn away, thus increasing the length of the voltaic arc, the electric current diminishes in strength, owing to the increased resistance. This weakens the magnetism of the helix, and, accordingly, the core, rod and carbon move downward by the force of gravity, until the consequent shortening of the voltaic arc increases the strength of the current and stops this downward movement. After a time, however, the clutch ring will reach its floor or support, and its downward movement will be arrested. Now, any further downward movement of the core,

however slight, will at once release the rod, allowing it to slide through the ring until it is arrested by the upward movement of the core, due to the increased magnetism. In continued operation, the normal position of the ring is in contact with its lower supports, the office of the core being to regulate the sliding of the rod through it. If, however, the rod accidentally slides too far, it will instantly and automatically be raised again, as at first, and the carbon points thus continued in proper relation to each other. * * * * [I do not limit myself narrowly to the ring, D, as other devices may be employed which would accomplish the same result. Any device may be used which, while a current of electricity is not passing through the helix, A, will permit the rod, B, to move freely up and down, but which, when a current of electricity is passed through the helix, will, by the raising of the core, C, operate both to clamp and raise the rod, B, and thereby separate the carbon points, F, F', and retain them in proper relation to each other."] The paragraph which is enclosed in brackets was subsequently disclaimed.

The patentee then described another form of his device, shown in figure 6 of the drawings, and which was applicable to a lamp which moves both carbons. This form, he said, contained his invention and was substantially like figure 1, in construction and operation. In figure 6, the core is rigidly connected with, and directly communicates its motion to, the carbon rod. The clamp surrounds the carbon rod and is lifted as the rod is lifted, while it is tilted, or held in its angular clamping position, by a spring, which is not attached to the core.

The application for the original patent contained five claims, as follows: 1st. In an electric lamp, the clamp, D, or its equivalent, by means of which the carbon holder, B, is firmly held and permitted to gradually feed the carbon point as the same is consumed, substantially as specified. 2d. In an electric lamp, the combination of the clamp, D, and adjustable stop, D', or their equivalents, by means of which the carbon points are prevented from becoming so far separated

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as to break the electric current and extinguish the light, substantially as specified. 3d. In an electric lamp, the combination of the core or armature, C, and the clamp, D, by means of which the carbon points are separated from each other as soon as an electrical current is established, and held asunder during the continuance of the current, and then permitted to come together as soon as the current ceases, substantially as and for the purposes specified. 4th. In an electric lamp, the combination of the core or armature, C, the clamp, D, and adjustable stop, D', or their equivalents, whereby the points of the carbons are separated from each other when an electrical current is established, prevented from separating so far as to break the current, and gradually fed together as the carbons are consumed, substantially as described. 5th. In combination with the core, C, one or more sustaining springs, c, substantially as and for the purpose shown.

The first and third claims were rejected by the examiner, upon the ground that they were anticipated by the English patent of Slater and Watson, of 1852. The application was thereupon amended by the erasure of those two claims, and by the insertion of the following, which became the first claim of the original patent, and, as amended, the patent was granted: "1st. In an electric lamp, the combination with the carbon holder and core, of a clamp surrounding the carbon holder, said clamp being independent of the core, but adapted to be raised by a lifter secured thereto, substantially as set forth."

The first four claims of the re-issued patent are identical with the four claims of the original patent. The 5th and 6th claims of the re-issue are as follows: "5th. In an electric lamp, the combination, with a carbon holder, of an annular clamp surrounding the carbon holder, said clamp adapted to be moved, and thereby to separate the carbon points, by electrical or magnetic action, substantially as herein set forth. 6th. In an electric lamp, an annular clamp, adapted to grasp and move a carbon holder, substantially as shown." It is not necessary to quote the 7th and 8th claims, as they re-

late to a different part of the invention and have been disclaimed.

On October 14th, 1881, the patentee disclaimed the paragraph in the descriptive part of the specification which has been quoted and placed in brackets. On April 6th, 1883, the patentee disclaimed "so much or such part of the invention described in said letters patent, and coming within the general language of the third claim thereof, as may cover or include, as elements thereof, 'the core or armature, C,' and 'the clamp, D,' excepting when the core or armature raises the clamp by a lifter secured to such core or armature, substantially as described in said patent." The specific combinations forming the subject-matter of the 2d, 7th, and 8th claims, were also, at the same time, disclaimed. The second disclaimer, so far as it relates to the second and third claims, was filed in consequence of the testimony which was introduced by the defendants respecting the lamps invented by Leroy S. White in 1874 and 1875, and manufactured by Wallace & Sons, of Ansonia, and which anticipated figure 6. The 2d claim manifestly related to figure 6, and the 3d claim might have been construed to include a lamp in which the clamp was raised by the rod, as well as by a lifter secured to the armature.

The question next arises, whether the disclaimer, having attempted to disclaim figure 6 and to retain figure 1, had left an invention in the patent; in other words, whether the differences between the two figures are those merely of detail, not involving any principle. The important thing in each lamp is the office of the clamp in connection with the carbon holder and the core. In figure 6, the clamp, when it comes in contact with the stop, arrests the upward movement of the rod, and thereby limits the distance between the carbons, but, says Mr. Pope, "it does not produce any material effect in connection with the downward or forward movement of the core or carbon." The clamp in figure 1 acts, "first, to permit a descent of the carbon rod and then to check such descent," or to control the intermittent forward motion, but, in figure 6,

there is no "such alternate permission and descent of the carbon rod by any action of the clamp." The clamp in figure 6 does not regulate the descent of the rod, whereas, in figure 1, it keeps a continuous intermittent feeding or forward motion of the rod. The experts upon the opposite side do not differ in regard to the feeding motion. Mr. Pope says: "It is accomplished by the contact of the clamping ring with the floor, which tilts the former into a position which permits the carbon holder to slip through it a sufficient distance to accomplish the object." Mr. Hicks says: "When the carbon rod, the clamp and the core have settled enough to bring the lower portion of the angular clamp in contact with the upper surface of the lower portion of the frame at the top of the lamp, which is its normal position in continued action, any further lengthening, or tendency to the lengthening, of the electric arc will cause the side of the clamp which is held by the lifter of the core to fall an almost imperceptible amount by the minute weakening of current. As the end of the clamp which is in contact with the frame cannot descend any further, the other end of the clamp descends, and the angular grip is slightly relaxed, which, no longer able to sustain the weight of the rod and carbon, allows the rod and the carbon to descend a trifle, which brings the carbon points slightly nearer together, shortening the arc a trifle, which gives a proportionate increase to the strength of the current passing through the helix, causes the core slightly to rise, carrying the lifter and one side of the ring instantly upward, which checks the further descent of the carbon holder through the clamp, and brings the annular clamp into the same angular position in regard to the carbon holder and the floor which it had before the last feeding adjustment."

The invention of figure 1 consisted in the described means of moving the rod, holding it by the angular impingement of the clamp, and continuously regulating the distance between the carbons, by a continuous and gradual feed through the annular clamp. The means by which the effect is produced are the lifting of the clamp, which is not fixed to the core and

which surrounds the rod, by a lifter secured to the core, so that the clamp will angularly impinge against, bite and arrest the upward movement of the rod, and then, as the current diminishes and the core drops, the consequent descent of the clamp, and the loosening of its grasp upon the rod, by its contact with the floor.

It is next claimed by the defendants, that, if this was the invention of the patentee, it was not described nor claimed in his patent prior to the disclaimer, and that, neither having been described nor claimed, it is an invention which was not shown in the patent, and, therefore, cannot be introduced into it by means of a disclaimer. The law upon this subject is clearly stated in *Hailes v. Stove Co.*, (21 *Blatchf. C. C. R.*, 271.) The doctrine of the *Hailes* case is not applicable here, because the effect of the disclaimer is to disclaim figure 6 from the patent and to retain figure 1, which was clearly described, and all whose mechanical features were pointed out, although the distinctive principle of the invention was neither known nor stated. The object of the disclaimer was to limit the patent to clamp, D, of figure 1, with the elements necessarily connected therewith, or specified as in combination therewith, and, as will hereafter be stated, the natural construction of the first claim is and was, that it relates to figure 1 and does not include figure 6.

The next point to be considered is the construction of the various claims. The defendants strongly insist that the first claim refers to figure 6, and that the clauses "said clamp being independent of the core, but adapted to be raised by a lifter secured thereto," mean, that the clamp is independent of, and not in any way dependent for its motion upon, the core, but is adapted to be raised by a lifter secured to itself. The plaintiffs insist that this language was intended to describe a clamp independent of, *i. e.*, not fixed to, the core, but adapted to be raised by a lifter secured to the core. The latter construction is in accordance with the natural meaning of the words used, and the claim, as thus construed, includes the invention which the patentee made, and which he desires to hold, while the defendants' construction de-

scribes an invention which he admits that he was not the first to make, and which he has endeavored to disclaim. The natural construction is the one which should be adopted.

It is next insisted by the defendants, that the first claim includes the adjustable stop, D, of the third claim, because it is said that the clamp will be inoperative without a stop. The first claim includes the combination of the clamp, core and rod, and the described elements which are necessary to cause an angular impingement upon the rod and an intermittent downward feeding of the rod. The stop is not one of these elements, but its office was to arrest the upward motion of the clamp. This claim is not limited to the described solenoid and core and to no other motor, but, by the words "solenoid and core" are meant an armature, or "any magnetically moving part whose property or law of motion is substantially that of a core in a solenoid."

The construction of the third claim does not require examination.

The clamp of the sixth claim is not any annular clamp adapted to grasp and move a carbon holder. If it was, the claim would be larger than the invention, and larger than the patent with the disclaimers. On the contrary, the claim means to describe, in general terms, the clamp of the first claim, which raises, clamps and feeds downwardly the rod, preserving a practically uniform length of arc by the described means, or an annular clamp surrounding the carbon holder, independent of the core, but adapted to be raised by a lifter secured to the core, or magnetic motor, and some suitable agency to allow the clamp to be tripped.

The fifth claim includes the clamp of the first and sixth claims, the carbon holder, the motor and the tripping device.

The next question is that of novelty. Neither one of the Slater and Watson lamps anticipated either claim, as thus construed. Their clamps raise, bite and release the rod, but do not have the gradual, intermittent feeding motion produced by the contact of clamp with floor.

The clamp, in combination with the other necessary elements, which was made by Charles H. Hayes, of Ansonia, Connecticut, and was a part of a lamp which he constructed, about the end of June, 1876, as an improvement upon the White lamp, is the combination of the first and third claims of the Brush patent. The carbon rod was square or rectangular, and, therefore, was surrounded by a rectangular clamp, which was independent of the core. It is not denied that this clamp is the equivalent of an annular clamp. It was raised by a lifter secured to the core, and was tripped by coming in contact with a floor, while the ascent of the rod was checked by the contact of the clamp with an adjustable stop.

The plaintiffs' answer to the anticipatory character of this clamp is, that it was an abandoned experiment and never was a perfected invention. The facts in regard to its character and position as an invention are as follows: Mr. Hayes was, in 1876, and has been continuously since, in the employ of Wallace & Sons, who are large manufacturers of brass goods, in Ansonia. In 1876, this firm was trying to find a successful electric lamp to manufacture. Mr. White furnished them with his device, which they sent as a part of their exhibit, to the Centennial Exposition at Philadelphia. Mr. Hayes testifies as follows: "Experiments with the White lamp showed its defects so strongly or plainly that I designed this (the Hayes) lamp to overcome those defects. I made rough drawings in the middle or latter part of May, 1876, commenced building the lamp at once, and finished it about the end of June following, tested it, tried it, and made some minor alterations, and ran it from time to time, when a lamp was needed, until the 16th of September following." At this time he was in Philadelphia, and a fellow employee, by the name of King, thinking that he could improve upon the clutch, and make the feeding of the carbon answer more promptly to changes of the current, or make the feeding less "jerky," obtained permission from Wallace & Sons, who owned the lamp, to make an alteration. The "King clutch," constructed upon a different principle from that of the Hayes

or the Brush clamp, was put into the lamp, which has remained in use in the mill, and, since the end of 1876, has been "used in the electrical room for testing machines, carbons, &c., and has been used for that purpose more or less ever since." But one Hayes lamp was made, until a duplicate specimen was made for use in this case. The Hayes clamp, it will be observed, was used in the lamp only until September 16th. Prior to that date, the use of the lamp with the original clamp is thus described by Mr. Hayes, upon cross-examination: "It (the lamp) was moved about and burned in different places, in the mill and outside, and it was also burned in another shop occasionally." This shop was known as the skirt shop, the third floor of which was used for electrical work. The mill and skirt shop were ordinarily lighted by gas. "Q. On what occasions did you use the lamp out of doors? A. The lamp was used out of doors on several occasions; when gangs of men required light, unloading freight from railway cars, digging for some work connected with the water power. I am unable to specify positively any particular date, but have a general recollection of being frequently called upon to make a light for some such purposes. Q. Did you use it sometimes to test dynamos with, in June to September, 1876? A. I think not during that time. Q. What other use did you put it to during those months, except the occasions out of doors which you have mentioned? A. It was used about the mill, more particularly around the muffles, on occasions when it was necessary to work during the evening" The use was a public one, in the presence of the employes of the factory. The Hayes clamp has been preserved and was an exhibit in the case. Wallace & Sons thereafter, after much experimenting, went, to a limited extent, into the manufacture of what were known in the case as "plate lamps," or lamps having two carbon plates instead of rods, but did not continue the business long. They say that the discontinuance was due to the fact that they did not have a satisfactory generator. The Hayes clamp was used upon the plate lamps, but,

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as has been said, was used upon but one carbon pencil electric lamp.

The plaintiffs vigorously insist that the Hayes clamp was not a completed and successful invention, but that its use was merely tentative and experimental, and was permanently abandoned because the device did not promise to be successful.

Two facts are manifest—1st, that the Hayes clamp was the clamp of the Brush patent; and 2d, that it became, after September 16th, a disused piece of mechanism in connection with carbon points. The question then is—Was it a perfected and publicly known invention, the use of which was abandoned prior to the date of the Brush invention, or was its use merely experimental, which ended in an abandoned experiment, on September 16th?

The plaintiffs, in support of this view, say that Wallace & Sons were searching for a successful lamp, and were exhibitors of an electric lamp at the Centennial Exhibition; that inventors were in their employ, who were encouraged to make experiments and trials, in the hope that something good might be produced, and, under this stimulus, one Hayes lamp was made; that improvements in the location of the spring were made; that it gave a "jerky" light, and, when the inventor was away, another clamp was put on, by the permission of the owners, to remedy this irregular feeding; that afterwards no other lamp was ever constructed, and the Hayes clutch was left among other "odds and ends;" and that the indifference with which it was received, its confessed faults, the attempted improvements, and its disuse, show that the Hayes clamp never was anything more than an attempt to invent something which proved to be a failure.

The question of fact, in this part of the case, must turn upon the character of the use of the lamp prior to September 16th, because it is established that the Hayes clamp and the Brush clamp, in the patented features, were substantially alike, and that the point in which they differ, viz., the length of the arms, is not a part of the principle of the device. Was

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the lamp with this clutch used merely to gratify curiosity, or for purposes of experiment, to see whether the feeding device was successful, or whether anything more was to be done to perfect it; or was it put to use in the ordinary business of the mill, as a thing which was completed, and was for use, and was neither upon trial nor for show?

Hayes made the lamp for Wallace & Sons as an improvement upon the White lamp, and apparently turned it over to them to be used where they chose. An alteration was subsequently made in the location of the spring. The lamp was used at different times, in the work of the mill, at night, in doors and out of doors. Its use at these times does not seem to have been for the purpose of testing the machine, or of calling attention to its qualities, or of gratifying curiosity, but it was used to furnish light to the workmen at their work. I have queried whether this use was not that of a thing which might be of help in an emergency, and which was thought to be better than nothing, though not of much advantage; but it was, apparently, used to accomplish the ordinary purposes of an electric light in a mill, to enable the workmen to see at night, although it was not uniformly used, because the mill was lighted by gas.

But the plaintiffs press the question—Why, then, was the further use of the Hayes clamp and lamp discontinued? This question is significant, because the abandonment of a thing which is greatly wanted is, ordinarily, a very suggestive circumstance to show that it was defective, and that, before the invention could be completed, something was to be done which never was done.

I think that Wallace & Sons did not push the electric lamp business because they had no generator, and I also think that the Hayes lamp, either with or without the Hayes clutch, did not impress them favorably, for they contented themselves with making only one specimen, whereas they made six White lamps, and, after much experimenting, and after the invention of the Hayes lamp, they made fifty or sixty plate lamps. For some reason they did not manufacture the Hayes lamp, but,

turned away to the plate lamps. But, the facts that the anticipatory device was the device of the patent, and did do practical work, and was put to ordinary use, and that it does not appear that the Hayes clamp was the cause of the neglect with which Wallace & Sons treated the Hayes lamp, seem to me to outweigh the doubts which arise from the shortness of its existence and its permanent disappearance from a carbon pencil lamp.

The case is that of the public, well known practical use, in ordinary work, with as much success as was reasonable to expect at that stage in the development of the mechanism belonging to electric arc lighting, of the exact invention which was subsequently made by the patentee; and, although only one clamp and one lamp were ever made, which were used together two and one half months only, and the invention was then taken from the lamp and was not afterwards used with carbon pencils, it was an anticipation of the patented device, under the established rules upon the subject. With a strong disinclination to permit the remains of old experiments to destroy the pecuniary value of a patent for a useful and successful invention, and remembering that the defendants must assume a weighty burden of proof, I am of the opinion that the patentee's invention has been clearly proved to have been anticipated by that of Hayes. (*Coffin v. Ogden*, 18 Wall., 120; *Reed v. Cutter*, 1 Story, 590; *Pickering v. McCullough*, 104 U. S., 310; *Curtis on Patents*, secs. 89-92.)

The bill, so far as it relates to the clamp patent, is dismissed.

George H. Christy, Causten Browne, and E. N. Dickerson, for the plaintiffs.

Edmund Wetmore and Chauncey Smith, for the defendants.

Pentlarge v. Kirby.

FREDERICK PENTLARGE, FOR HIMSELF AND THE UNITED STATES, PLAINTIFF IN ERROR

vs.

JOSIAH KIRBY, DEFENDANT IN ERROR.

Where a Court of the United States dismisses a suit at law for want of jurisdiction, it cannot award costs against the plaintiff.

There is nothing in the provisions of §§ 823, 914 and 983 of the Revised Statutes, which has changed this rule.

Section 914, as to practice, does not apply to costs, and relates only to cases of which there is jurisdiction.

Sections 823 and 983 do not require the awarding of costs in all cases where there are no express statutory provisions to the contrary.

(Before WALLACE, J., Southern District of New York, July 15th, 1884.)

WALLACE, J. This writ of error is brought to review a judgment of the District Court for the Southern District of New York in favor of the defendant, for costs, and sustaining his demurrer to the plaintiff's complaint. The Court below held, that, upon the case made by the complaint, the Court did not have jurisdiction of the subject of the action. (19 *Fed. Rep.*, 501.)

For reasons which were announced orally at the hearing of the writ of error, no doubt is entertained that the District Court correctly determined that the action was not one of which it had jurisdiction, but the question remains, whether it was not error to order a judgment for the defendant awarding costs against the plaintiff.

The rule is uniform in the Federal Courts, that, where the case is one of which the Court has no jurisdiction, the duty of the Court is to dismiss it upon that ground, and without costs. (*Burnham v. Rangeley*, 2 *W. & M.*, 417; *McIver v. Wattles*, 9 *Wheat.*, 650; *Strader v. Graham*, 18 *How.*, 602; *The McDonald*, 4 *Blatchf. C. C. R.*, 477; *The Mayor v. Cooper*, 6 *Wall.*, 247; *Gaylards v. Kelshaw*, 1 *Wall.*, 83; *Hornthall v.*

The Collector, 9 Wall., 560.) The reason of the rule is stated by Mr. Justice Swayne, in *The Mayor v. Cooper*, as follows: "The Court held that it had no jurisdiction, whatever, of the case, and yet gave a judgment for the costs of the motion, and ordered that an execution should issue to collect them. This was clearly erroneous. If there were no jurisdiction there was no power to do anything but to strike the case from the docket." And in *Burnham v. Rangeley*, Woodbury, J., after citing decisions in various State Courts, sustaining the general rule, says: "These generally proceed on the ground that the Court has no jurisdiction to award costs any more than to award damages, or any other relief on the merits, when the case is not legally before them." In *Hunt v. Inhabitants of Hanover*, (8 Met., 346,) Dewey, J., repudiates the distinction which has sometimes been suggested, that no costs are to be allowed in plain and obvious cases of want of jurisdiction, but should be allowed when the question of jurisdiction is one of doubt and difficulty, characterizing it as too shadowy and uncertain for a rule of practical application, and as unsound in principle.

Many respectable authorities are found to the contrary, and assert that, inasmuch as the Court must determine whether it has authority to entertain a particular controversy, it has, to that extent, jurisdiction over the parties and the subject-matter; its decision is a judicial act; and, as an incident of the power to decide, it has the power to award costs. It will not be useful to cite them, because the law of the Federal Courts is decisive here.

The learned District Judge who decided this case, in opinions delivered by him in *United States v. Treadwell*, (15 Fed. Rep., 532,) and *Cooper v. New Haven Steam Boat Co.*, (18 Id., 588,) suggests that the provisions of the Revised Statutes of the United States have changed the pre-existing law, so that now costs are to be allowed to the prevailing party in all cases where there is not an express statutory provision to the contrary; and, therefore, that the Federal Courts are not

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now to refuse costs, when they dismiss cases for want of jurisdiction.

One of the sections of the Revised Statutes to which he refers is 914, which was originally enacted in 1872, conforming the practice in the Federal Courts, in common law actions, as near as may be, to that of the State Courts. This section goes no further than to prescribe a general rule regulating practice and procedure in the Federal Courts, in the absence of any legislation by Congress upon the subject. (*Wear v. Mayer*, 2 *McCrary*, 172.) It speaks only when the other statutes of the United States are silent. (*Peaslee v. Haberstro*, 15 *Blatchf. C. C. R.*, 472.) It has no application to the subject of costs, because that subject is covered by other provisions of the Federal laws. Moreover, it only applies to cases of which the Federal Courts have jurisdiction. It does not create or extend jurisdiction, but regulates the procedure in cases which the Federal Courts are authorized to entertain and decide.

The other provisions of the Revised Statutes which it is suggested have changed the pre-existing law as to costs, are those found in sections 823 and 983. These sections deal with the subject of costs in suits in Equity and Admiralty, as well as at common law, and, if it is true that they require the Courts, in all cases, to award costs to the prevailing party when there are no express statutory provisions otherwise, they make a startling innovation upon the law as it previously existed, and introduce a radical change. There are no express statutory provisions which authorize a disallowance of costs to the prevailing party in the large class of cases in Equity and Admiralty, where, in the exercise of judicial discretion, it has been the rule to disallow them, and sometimes to award costs against the prevailing party. In Equity and Admiralty, the essential merits and justice of the contention, rather than the result of the litigation, have always controlled the judicial discretion, in adjudging costs. These sections reproduce provisions of the Act of February 26th, 1853, (10 *U. S. Stat. at Large*, 161,) entitled, "An Act to regulate the

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fees and costs to be allowed clerks, marshals, and attorneys of the Circuit and District Courts of the United States, and for other purposes." That Act, by the first clause, prescribed that, "in lieu of the compensation now allowed * * * the following and no other compensation shall be taxed and allowed." It then, by distinct clauses, enumerated what fees were to be taxed in causes at common law, in Admiralty and in Equity, for clerks, marshals, attorneys and witnesses, and enacted that such fees, together with certain specified disbursements, should be included in and form a portion of the judgment against the losing party, "in cases where by law costs are recoverable in favor of the prevailing party." The language of this Act is reproduced in the above sections of the Revised Statutes, without material change. Section 823 reproduces the language of the first clause of the Act of 1853, but the words "in lieu of the compensation now allowed" are omitted, as manifestly unnecessary, and the words "except in cases otherwise expressly provided by law" are added, because, in the revision there are incorporated several provisions taken from other Acts of Congress, respecting costs in particular cases. Section 823 deals only with the amount of compensation to be allowed. Section 983 reproduces the language of the clause of the Act of 1853 which authorizes costs to be made a portion of the judgment against the losing party. This is the section which deals with the right to recover a judgment for costs, and it makes no change in the previous law. It leaves the right where it found it in the Act of 1853, and authorizes a judgment for costs against the losing party, "in cases where by law costs are recoverable in favor of the prevailing party." Reading sections 823 and 983 together, they are not fairly susceptible of a construction which changes the pre-existing law. The intention to make a radical change is not to be implied in a revision; and, if there is any fair room for doubt, the original Acts may be resorted to in aid of interpretation. (*United States v. Bowen*, 100 U. S., 513.) From their first organization to the time of the adoption of the Revised Statutes, and since, the Federal Courts have always

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assumed to exercise the power of awarding costs, as incident to their power to decide upon the rights of the parties. In the very recent case of *Mansfield, &c., R. Co. v. Swan*, (111 U. S., 379,) Mr. Justice Matthews, in delivering the opinion of the Supreme Court, uses the following language: "As to costs in this Court, the question is not covered by any statutory provision, and must be settled on other grounds. Ordinarily, by the long established practice and universally recognized rule of the common law, in actions at law, the prevailing party is entitled to recover a judgment for costs, the exception being, that, where there is no jurisdiction in the Court to determine the litigation, the cause must be dismissed for that reason, and, as the Court can render no judgment for or against either party, it cannot render a judgment even for costs." It must, therefore, be held, that it was error in the Court below to render a judgment for costs against the plaintiff.

Following the precedent in the case of *The McDonald*, (4 Blatchf. C. C. R., 477,) the plaintiff in error, although he succeeds in reversing the judgment of the Court below, is not entitled to costs here.

The judgment of the District Court is reversed, and the case remanded to that Court, with directions to dismiss the suit without costs to either party.

Henry Brodhead, for the plaintiff in error.

Edward Fitch, for the defendant in error.

The Vacuum Oil Company v. The Buffalo Lubricating Oil Company, Limited.

THE VACUUM OIL COMPANY

vs.

THE BUFFALO LUBRICATING OIL COMPANY, LIMITED. IN EQUITY.

The claim of re-issued letters patent, No. 7,321, granted to the Vacuum Oil Company, as assignee, September 26th, 1876, the original patent, No. 58,020, having been granted to M. P. Ewing, September 11th, 1866, namely, "An unburned, residual, heavy hydro-carbon oil, substantially as described," is an unlawfully expanded claim, because it claims a product, however produced, while the original patent claimed the product when made in a certain way.

(Before COXE, J., Northern District of New York, July 16th, 1884.)

COXE, J. This is an equity action, founded upon re-issued letters patent, No. 7,321, issued to the complainant, as assignee, on the 26th of September, 1876. The application was filed January 29th, 1876. The original patent, No. 58,020, was issued to M. P. Ewing, September 11th, 1866.

Of the various defences interposed, but one will be examined, viz., that the re-issue is void, for the reason that the claim is improperly expanded.

The claims are as follows :

Original.

"As a new manufacture, an oil-product, as above described, when produced from crude petroleum by the evaporation therefrom of the lighter hydro-carbons in vacuo, by the use of steam or its equivalent, to prevent burning, substantially as herein set forth."

Re-issue.

"An unburned, residual, heavy hydro-carbon oil, substantially as described."

It will be observed, that, in the re-issue, the product

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alone is claimed. All reference to the manner in which it is produced is omitted. The original limited the invention to a heavy residual oil produced from crude petroleum by the evaporation therefrom of the lighter hydro-carbons in vacuo, by the use of steam or its equivalent. The attempt in the re-issue is, to claim the oil product, no matter by what process produced—to sweep into complainant's net every new method of producing the desired result, and every improvement upon the old method, which had been discovered during an interval of nearly ten years, or which may be discovered in the future.

It is suggested that the claim should be read in connection with the description, and, if so read, the precise manner of manufacture described in the original is pointed out. It is true that it should be so read, and it may be conceded that the original process is referred to. But the description does not limit the invention to a product produced by vacuum distillation with the aid of steam. On the contrary, the intention to provide for all contingencies is boldly announced, in these words: "It is not intended to limit the present claim of invention to the product of precisely the same process hereinbefore described, as modifications thereof may be readily made, embodying the same principle of distillation at low temperature, to which the obtaining of the product in question is due."

That the claim of the re issue has been unlawfully broadened there can be little doubt, and the long lapse of time after the date of the original brings the case within the recent decisions of the Supreme Court.

There should be a decree for the defendant, with costs.

George B. Selden and T. Outerbridge, for the plaintiff.

James A. Allen and Corlett & Hatch, for the defendant.

Fryer v. Maurer.

WILLIAM J. FRYER, JR. vs. HENRY MAUREE. IN EQUITY.

Re-issued letters patent, No. 5,174, granted to Balthasar Kreischer, December 3d, 1872, for an improvement in tiling used in fire-proof buildings, under the floors, the original patent, No. 112,930, having been granted March 21st, 1871, are invalid, because everything which is of the substance of the invention was old, except a slight change in the form of the recess in the end sections of the tiling, and the patent describes that change vaguely, and sets forth no advantages as resulting from it.

The decision in this case, *ante*, p. 100, confirmed.

(Before WALLACE, J., Southern District of New York, July 16th, 1884.)

WALLACE, J. A rehearing was granted in this cause, (*ante*, p. 100,) because it appeared that an erroneous interpretation had probably been placed upon the description in the English provisional specification of George Davis, at the original hearing. Upon the rehearing, however, the defendant was permitted to introduce a new exhibit, the Guichard French patent of 1869, which supplies all that was attributed originally to the Davis provisional specification.

The Guichard patent is, in fact, a complete anticipation of everything that is essential and valuable in the complainant's invention, as described and claimed in his letters patent, although it is introduced as showing that, in the prior state of the art, there was no invention in Kreischer's hollow tiled arch.

The complainant insists that his patent is not for a flat arch of sectional hollow tiles supported by girders, the sections of which have plane joints, and recesses where they abut against the girders, to catch over the flanges of the girders; but that it is for a flooring consisting of the flanged iron girders, the flat arch of sectional hollow tiles, with recesses which go under the flanges of the girders, wooden floor joists resting on the tiles, and with air spaces between the top of the tiles and the wooden floor. The patentee might have claimed such

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a flooring, but he did not, either in his original or the re-issued patent, and obviously because he did not mean to be limited to such an invention. The claim of the original is for a hollow arched tile, made in three sections, having recesses in the end sections to catch over the bottom flanges of the iron girders, and the middle section being a wedge-shaped key. The iron girders are necessarily included as a feature of the invention thus claimed; because, otherwise, there would be nothing to support the arch, and nothing for the recesses to catch upon or over; and, by a reference to the description and the drawings, the entire conception of the patentee may be readily understood.

In the re-issue, two claims are inserted in the place of the one claim of the original. The first claim is merely a more specific statement of the claim of the original, except that it does not limit the invention to an arch composed of three sections, and eliminates the recess in the end sections, as a constituent. As it was apparent, from the description in the original, that the arch could be made of a larger number of sections, and could be made without recesses in the end sections, it was proper to make these modifications in the first claim of the re-issue; and the claim of the re-issue was for the same invention described in the original.

The second claim in the re-issue is the first claim limited by making the recesses in the end sections of the tile, which are left out in that claim, a constituent. It is the same as the claim of the original patent, except that it does not confine the invention to an arch having three sections only; and, for the reasons stated in reference to the first claim, it is for the same invention described in the original. As the re-issue was obtained within two years of the issue of the original, it is valid.

But it becomes necessary for the complainant now, in view of the evidence showing the prior state of the art, to abandon the real claims of the patent, which are for a peculiar arch of hollow tiles supported by girders, to be used in the walls or in the ceilings of buildings, and to substitute a claim for a floor-

ing, with air spaces for ventilation, and an arch of a special construction, which is peculiarly contrived to form the ceiling of the room below.

The patentee undoubtedly conceived, that, when his arch was used as a ceiling under the flooring of buildings, an incidental advantage could be obtained, by constructing it so as to leave air spaces for ventilation to the sleepers and flooring; and he pointed out the advantages of his arch over brick arches in that respect; but he did not intend to limit himself to a claim which would not be infringed if a flooring and sleepers were not used in connection with his arch. The language of the claims is not fairly susceptible of such a construction. They would be infringed if his arch were used, although the space above it were filled up with cement and no sleepers or flooring were used.

The slight variation between the form of the recess in the end sections of the patentee's tiles and that found in the several earlier arches of sectional hollow tiles, is not of sufficient novelty to sustain the patent. The patentee describes the arch as provided, at its end sections, with a recess "to catch over" the bottom flanges of the iron girders when his arch is used for ceilings, but he does not suggest any special advantage arising from the form of the recess. The recess was, apparently, designed to assist in supporting the arch as a locking device. If it has any advantages over those which were used for the same purpose by others previously, arising from its form, the form should have been described. The form is shown in the drawings, but, obviously, the language of the description does not confine the patentee to any particular form, but covers any form which will enable the end tile to "catch over" the flange. It may be that the earlier recesses do not catch over, but they lock the girder, for all practical purposes, as well as those of the patentee. In any event, the patentee's change in the form of the recess does not amount to invention. The recess in the defendant's end tiles does not differ materially from the recesses in the Garcin and Roux, Frères' exhibits; yet the com-

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plainant insists that the defendant has the recess described in the patent.

In conclusion, there was no patentable novelty in Kreischer's hollow tiled flat arch, the invention which is claimed in the complainant's patent, in view of the prior state of the art. Hollow tiles were old; flat arches were old; flat arches made of hollow tiles in sections were old; flat arches of sectional hollow tiles with plane joints were old; such arches supported at the ends by girders, and used to support the floors of fire-proof buildings, were old; such arches thus supported were old, when the end sections of the tiles were provided with recesses to receive the flanges of the girder. Everything which is of the substance of the invention was old, except a slight change in the form of the recess in the end sections of the tiling. No advantages arising from this change of form are suggested in the patent, and it is doubtful whether there are any practically. If there are any, the form is described in terms so vague, that any form which serves to lock the tile to the girder will satisfy the description; and the old recesses would do this. Kreischer doubtless thought that his arch was new, and he described and claimed his invention broadly upon this theory. It is now shown to have been old; and it is quite useless to attempt to sustain the patent upon refined distinctions in minor details in structure, which the patentee evidently never contemplated, and which certainly are not within the claims as expressed in the patent.

The bill is dismissed.

George W. Van Siclen, for the plaintiff.

John A. Foster, for the defendant.

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HENRY B. TURNER

vs.

THE PEOPLE'S FERRY COMPANY. IN EQUITY.

Under the Act of the Legislature of New York, of April 9th, 1813, (2 *Rev. Laws* of 1813, *ch.* 86, *p.* 432, *secs.* 220, 221,) in connection with the ordinance of the Common Council of the City of New York, of December 31st, 1856, laying out East street, along the East river, a person who filled up the intermediate space lying between a lot owned by him and a street or wharf laid out along the East river, became the owner of such intermediate space when filled up, but did not acquire any riparian rights, or any rights of wharfage along the bulkhead opposite such ground.

An injunction to restrain a public improvement should not be granted upon the application of a private party, unless the legal right and the threatened injury are clear and certain.

(Before BROWN, J., Southern District of New York, July 17th, 1884.)

BROWN, J. A motion is made for an injunction, *pendente lite*, to restrain the defendant from erecting its proposed ferry rack and ferry house along the southerly side of the 23d street pier, in the slip between the wharves at 22d street and 23d street, East river.

The defendant was empowered, by Act of the Legislature, (*Laws* of 1882, *ch.* 193,) to establish and operate a ferry from near Broadway, Brooklyn, across the East river to 23d street, New York, and to acquire the necessary franchise therefor. It subsequently acquired this franchise by purchase from the City of New York, at public auction, at a fixed yearly rental; and also obtained a lease from the city of the 23d street pier. It has given bonds for the performance of all the various conditions of the lease, and of the franchise to operate the ferry, and has submitted its plans for the proposed ferry structures. These plans have been approved by the proper city authorities; and, the defendant being about to begin the erection of

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these structures, the plaintiff seeks to enjoin the prosecution of the work, on the ground that it will inflict irreparable injury on his alleged riparian rights, as lessee of the premises along the bulkhead line at the head of the slip between 22d and 23d streets, by occupying nearly one-half of the slip, at a distance of 145 feet directly in front of his bulkhead, thereby obstructing his business in the slip and on shore, as at present conducted.

The proposed ferry is evidently conducive to the public convenience and utility. No irregularities are suggested in the defendant's proceedings. I must assume, therefore, that the defendant has all the authority for the erection of these structures that the City or the State could confer; and a work thus authorized, and for the public benefit, should not be arrested at the instance of a private party, unless both his right and his injury be clear and certain. (*Taylor v. Brookman*, 45 Barb., 106.) I am not satisfied that the proposed structures would not leave the complainant in the enjoyment of all the rights that he can legally claim; and, without reference to the other points raised, the injunction, *pendente lite*, should on that ground be denied.

The plaintiff, in March, 1881, leased from the executors of John L. Brower certain premises between 22d and 23d streets, for nine years from May 1st, 1881, with the privilege of a renewal for ten years afterwards. The premises leased are described in the lease as bounded on the east "along the East River," and no reference is made in the lease to any bulkhead or wharf, or to any wharfage or riparian rights of any kind. The complainant hired the premises for the purposes of a coal yard, expecting to receive and to deliver coal in boats moored alongside the bulkhead, as he has hitherto done. His affidavit states, that, at times, he has had twenty canal boats moored there at once. It appears, however, that, prior to this lease, the Pennsylvania Coal Company, a former lessee, had been accustomed to receive and to deliver coal there, in like manner, using the bulkhead as a place of landing; and that this privilege enhances the rental value of the premises. It can scarce-

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ly be doubted that this use was contemplated by the lessor, as well as by the lessee, and that the terms were in reference to it. The complainant has sub-let the northerly half of his premises to Clark & Allen, who have erected thereon a grain elevator, used in connection with the landing of boats at the bulkhead. It must be assumed, therefore, under such circumstances, that the lease to the complainant was intended to pass, and did pass, as an incident thereto, whatever rights of wharfage the Brower estate held. (*Huttemeier v. Albro*, 18 N. Y., 48; *Voorhees v. Burchard*, 55 Id., 98.) It could not pass more. What their rights were is the turning point.

The premises in question are far to the eastward of the line of 400 feet below low water-mark, and hence were formerly the property of the State, from which Brower's title to the lots and his rights of wharfage, if any, must be deduced. Omitting any reference to various acts and grants by the Legislature and the City, which present some complications of title, and which are set forth in detail in the elaborately considered case of *Nott v. Thayer*, (2 Bosw., 10,) the view most favorable to the title and rights of John L. Brower is that claimed by the complainants to have been derived from the Act of the Legislature, of April 9th, 1813, (2 Rev. Laws of 1813, ch. 86, p. 432, secs. 220, 221,) in connection with the ordinance of the Common Council, of December 31st, 1856, laying out East street. By the Act of 1813, (re-enacting the Act of April 3d, 1798, chap. 80,) the Legislature authorized the Mayor, aldermen, &c., in brief, to lay out streets or wharves in front of those parts of the City which adjoin the East River, and from time to time to lengthen and extend said streets, or wharves, to be completed "at the expense of proprietors of land adjoining or nearest and opposite to the said streets or wharves;" that such proprietors should fill up "the spaces lying and being between" their lots and such streets and wharves; and that, upon so filling up and levelling the same, they should "become the owners of the said intermediate spaces of ground, in fee simple."

On December 31st, 1856, the Mayor, aldermen, &c.,

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passed an ordinance establishing East street, as an exterior street along this portion of the East River. Without stopping to enquire whether this ordinance and the proceeding to acquire title under it were valid under the Act of 1813, but assuming them to be so, East street, as thus laid out, would cross 23d street along the westerly line of Avenue C, extended; and the same ordinance directed the existing numbered streets to be extended to East street, and that the proprietors of lands nearest to or opposite East street, as thus established, should make and complete the street, and fill in the intermediate spaces, by January 1st, 1860. Before this ordinance was carried into effect, the work was arrested by the action of the Harbor Commissioners, appointed under the Act of March 30th, 1855, whose report, confirmed by Act of the Legislature, passed April 17th, 1857, fixed the exterior bulkhead line, in that vicinity, as it now exists, far within the proposed East street, and prohibited any solid filling in beyond this bulkhead line. This line is somewhat to the eastward of Tompkins street, and is between Avenue A and the extension of Avenue B. The Brower estate, it is claimed, acquired the fee of the land between Tompkins street and this bulkhead line of 1857, by filling in the "intermediate spaces," as provided by the Act of 1813; but, as I must assume, it did not build either the 22d street or the 23d street pier, nor did it ever obtain any express grant from the City of the lots lying east of Tompkins street, or of any right of wharfage thereon. As incident to the land thus filled in, it is claimed that the Brower estate acquired riparian rights, and the rights of wharfage along the bulkhead. It is along this bulkhead between 22d and 23d streets that the complainant, as lessee, alleges that his riparian rights are threatened with injury.

As I have before said, none of the premises occupied by the complainant were any part of the original shore; they were a part of the harbor of the City of New York, and far below even low water-mark. Riparian rights do not attach, as a matter of course, to a grant of such lands under tide water. A right of wharfage, in such cases, as an incorporeal

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hereditament, must be derived either from the express terms of the grant, as in *Langdon v. The Mayor*, (93 *N. Y.*, 129, 150,) and in *Marshall v. Guion*, (1 *Kernan*, 461,) or from the clear and manifest intent of the grant, as shown by the surrounding circumstances, such as prior use, or the declared intention of the grant. (*Langdon v. The Mayor*, 93 *N. Y.*, 129, 144; *Voorhees v. Burchard*, 55 *Id.*, 98; *Huttemeier v. Albro*, 18 *Id.*, 48.) In the absence of an express grant of wharfage, or of such manifest intention, the City or the State, as the case may be, may make successive grants of its lands under water, each in front of the former, to different grantees, without any violation of the rights of either; and neither the first nor the last grantee will acquire any exclusive riparian privileges. None of such grantees are, in any proper sense, riparian owners at all; and riparian rights do not attach to such grants. (*Weber v. Harbor Commissioners*, 18 *Wall.*, 57, 67.) In this State, where the common law on this subject prevails, and the State is owner of the soil below high water-mark, it was long since settled, that a grant of such lands, even with a right to erect a wharf expressed in the grant, was, by implication of law, not an exclusive grant of wharfage rights; but that such rights, so long as they were not wholly cut off, were subject to be modified and abridged, through other grants and other harbor regulations for the public benefit, without compensation. (*Lansing v. Smith*, 8 *Cow.*, 146, and 4 *Wend.*, 9, 22-24.) And, in the case of *Gould v. The Hudson River R. R. Co.*, (2 *Seld.*, 522) it was held by the Court of Appeals, that an owner of upland along high water line on the Hudson River, had no exclusive riparian rights below that line, and hence sustained no legal damage from a railroad embankment built under a grant from the State, which cut off his access to the river. This decision has never been questioned as a rule of property in this State. (See *People v. Tibbetts*, 19 *N. Y.*, 523, 528; *People v. Canal Appraisers*, 33 *Id.*, 461, 487.) It was cited, and its principles re-affirmed, in the recent case of *Langdon v. The Mayor*, (*supra*), where the decision rested upon an express grant of wharfage rights.

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As establishing a law of property, these decisions would be binding, I think, under § 721 of the United States Revised Statutes, as rules of decision in the Federal Courts, even if there was no authority in the Supreme Court on this subject. (*Barney v. Keokuk*, 94 U. S., 338.) But the decisions of the Supreme Court are of precisely the same effect. In *Yates v. Milwaukee*, (10 Wall., 504,) (relied on by the complainant's counsel,) the rights of even a strictly riparian proprietor are declared to be "subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public, whatever these may be." But in the subsequent case of *Weber v. Harbor Commissioners*, (18 Wall., 57,) the Supreme Court held, that a grant from the State of land under water in the harbor of San Francisco, up to the exterior line of the bulkhead, where the City already had by law the control of the wharves and of wharfage rights, did not confer on the complainant any riparian rights as against the City; and his bill, filed to prevent such rights from being wholly cut off, was dismissed. That case, in all essential particulars, was analogous to the present. It is true, that the complainant there had built out a wharf for his own use. But the complainant here claims certain exclusive privileges in the slip beyond the bulkhead, which involves the same principle. It was not there proposed to abate the complainant's wharf as a nuisance; but to surround it by a larger wharf, and appropriate it to the public use. Had the complainant there been held to have had any right to exclusive privileges along his bulkhead, he would have been entitled to his injunction or to compensation. But the Court say: "The complainant is not the proprietor of any land bordering on the shore of the sea, in any proper sense of that term. * * * There is no just foundation for his claim as a riparian proprietor. He holds, as his predecessors took, the premises, freed from any such appendant right. * * * They took whatever interest they obtained in subordination to the control by the City over the space immediately beyond the line of the water front, and the right of the State to regulate the con-

struction of wharves and other improvements. * * * Having the power of removal [of the complainant's wharf] she could, without regard to the existence of the wharf, authorize improvements in the harbor, by the construction of which the use of the [complainant's] wharf would necessarily be destroyed," (pp. 65-67.) The same principles were again affirmed and applied in *Barney v. Keokuk*, (94 U. S., 324,) and in the recent case of *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, (109 U. S., 672,) where it was held, that a public street, intervening between the complainant's lots and the established river front, cuts off any exclusive riparian rights in the owner of the lots on the opposite side of the street, whether the fee of the street be in the public or not, the complainant not having any express grant of wharfage rights.

The Federal decisions are in accord, therefore, with those of this State, so far as respects riparian rights attaching to grants of land under water in harbors or along navigable rivers. I find no case where any such exclusive rights are recognized, unless they are derived from the State or the City in express terms, or else by necessary implication from the circumstances of the grant.

But, if the Act of 1813 and the ordinance of 1856 be looked to as sources of the grant of a right of wharfage, no allusion to wharfage, or to any riparian rights on the part of those filling in the intermediate spaces, is found there, except on condition of their having built the wharves or piers, which it is not here claimed that they did; and the whole tenor of both the Act of 1813 and the ordinance of 1856 is manifestly inconsistent with the idea that the owners who should fill in the intermediate spaces were otherwise to acquire any right of wharfage, or even any title to lots to the water's edge, so as to become riparian owners at all. Under the ordinance of 1856, East street was to be an exterior street, which would separate such proprietors from the water front; and, under the Act of 1813, an exterior street, like West street, or South street, was also contemplated. But, even had not such an exterior street been

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designed to intervene, under the ordinance of 1856 and the Act of 1813, to cut off any riparian ownership from those who might fill in the "intermediate spaces," still the Act of 1813 itself manifestly confers on the City the right of wharfage on the wharves to be built out by it from the extended streets, and the control of wharfage rights. Subsequent Acts have repeatedly confirmed this right. (*Langdon v. The Mayor*, 93 *N. Y.*, 144, 145.) The wharves form the slips, and, without the protection of the wharves, in the rapid tides of the East River, the bulkheads themselves would be comparatively impracticable for use. The slips themselves are so narrow, being not much above 200 feet wide, that the exercise of unrestricted rights of wharfage by an owner along the line of the bulkhead would, moreover, be plainly incompatible with the exercise of the same rights by the City upon its own wharves on each side of the slips. The slips formed by the wharves are appurtenant to and for the use and benefit of the wharves, and of the City that owns them, and of the public that is entitled to the full use of them; not for the use or benefit of the bulkhead owners. Without the full, and, it may be, exclusive, use of the slips, the full use of the wharves cannot be enjoyed. If an owner along the bulkhead line can lawfully moor six, eight, ten, or even twenty canal boats at once alongside the bulkhead, tier upon tier, as it is said the complainant sometimes has done, he may thus occupy the whole slip, and exclude the public from the wharves altogether, and the City from its rightful wharfage and use of the slip. On the other hand, the full enjoyment of the wharves by the City, or its lessees, for wharfage purposes, may, if the public needs require it, demand the use of the entire slip. There cannot exist, therefore, full riparian rights of wharfage in both parties at the same time. The Act of 1813 leaves no possible doubt which of the two—the City, which builds the wharves, or the owner, who fills in intermediate spaces, and thus becomes owner of the bulkhead lots—is intended to enjoy this right of wharfage. All that the Act of 1813 gives to the latter is the title to the "intermediate spaces;" an exterior street, as I have said,

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being contemplated by that Act, which would exclude him from the enjoyment of riparian rights, while the City is to take the benefit of the wharves which it builds, and with them the use of the slips for the purposes of wharfage. No intention to confer riparian rights on the owner of spaces filled in can be deduced from the Act of 1857, which prevented the construction of the proposed exterior street.

As the estate of Brower, therefore, obtained no right of wharfage by the terms of any grant, nor by any intention of the City or State from whom it derives title, it has not, in my judgment, any legal right, as against the City or its grantees, to convert the bulkhead into a wharf, and maintain it as such, as a means of private emolument; nor even any proprietary right in the bulkhead, as a place for landing its own boats, to the exclusion of any necessary use, by the public, under the City or its lessees. It may, doubtless, land boats there by sufferance, as any other citizen might do. But it has no right to obstruct the use of the slip, or of any part of it that may be required by the public in mooring boats along either the 22d or 23d street wharves up to the line of the bulkhead; nor to interfere with any other appropriate use of a wharf, such as a ferry landing, that the City and State may authorize.

This case differs from all others that have been cited in support of the injunction, in the fact that the complainant and those whom he represents have neither any title to the slip or to the land in front of the bulkhead, nor any express grant of a right of wharfage, nor any evidence of any intent by the State or City to grant such a right. The case of *Lansing v. Smith*, (*supra*), as above observed, long since decided, that, even if wharfage had been granted, subsequent obstructions in front, necessary for the public convenience, were no ground for a claim of damages, so long as access, though impaired, still remained. In the present case, a basin of 145 feet will remain free along the upper part of the bulkhead; while the lower part, embracing more than one half of the complainant's frontage, is completely open and unobstructed as before.

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The papers before me do not show any legal rights in the complainant beyond this means of access still reserved to him by the proposed structures; and without, therefore, referring to the other points raised, the motion should, upon the above ground, be denied.

Anderson & Howland, for the plaintiff.

M. J. O'Brien and *S. G. Clarke*, for the defendant.

HENRY LOUIS BISCHOFFSHEIM

vs.

HERMANN R. BALTZER AND WILLIAM G. TAAKS. IN EQUITY.

H. and L. were partners. The defendants were their confidential agents, and owned bonds issued by a State. Being ordered by H. and L. to buy for them some of the bonds, they charged H. and L., in account, with a sum of money, as paid for the bonds. The bonds were afterwards declared void by the highest Court of the State. The account was adjusted with the item in it, the defendants retaining the bonds, H. and L. supposing that the defendants had bought the bonds from other parties. L. having died, H., as survivor, sued, in equity, to set aside the transaction, rectify the account, and recover the amount due: *Held*,

- (1.) A suit in equity would lie;
- (2.) It was not necessary that the next of kin, or personal representative, of L. should be a party to the suit;
- (3.) The defendants being, in fact, the sellers of the bonds, without the knowledge of H. and L., and the bonds being worthless, and the transaction not having been ratified by H. and L., the sale must be set aside, and the account resettled.

(Before WHEELER, J., Southern District of New York, July 17th, 1884.)

WHEELER, J. The orator, and Louis Raphael Bischoffsheim, since deceased, were merchants and bankers, doing business in partnership, in London. The defendants were partners

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doing like business in New York, and were confidential correspondents and agents of the orator's firm. The Legislature of the State of North Carolina passed an Act for the issue of bonds in aid of the Chatham Railroad Company in that State, against which the State was secured by mortgage of the road. The defendants and Schepeler & Co. furnished iron for the road, for which they were secured by deposit of State bonds in the Continental National Bank. The defendants were directed to buy \$100,000 in amount of these bonds for the orator's firm, and they charged that firm, in account current of their dealings, on November 21st, 1868, with \$63,125, the price of that amount of bonds, and reported a purchase at that price. These bonds have been adjudged by the highest Court of the State to be wholly unconstitutional and void. (*Galloway v. Jenkins*, 63 *N. C.*, 147.) The account, amounting to several millions, was adjusted with this item in it, and the bonds were left in the hands of the defendants, for the orator's firm. In 1873, the defendants brought an action at law against the railroad company, whose name had been changed to the Raleigh and Augusta Air Line Railroad Company, to recover the price of the iron, for the benefit of the orator and themselves, and failed, so far as is apparent, because their remedy, if any, was in equity; and in 1878 they brought a suit in equity to reach the property, through the mortgage to the State of North Carolina, and in that suit they used the orator's bonds as their own, with other bonds of theirs, for the benefit of the orator with themselves, and they charged the orator with a part of the expenses of these suits, which were paid. Neither the orator's firm, nor the orator as survivor, was informed of the interest of the defendants in the bonds at any time, until after the suit in equity was commenced by the defendants; but they supposed that the defendants had bought the bonds of others expressly for them, and had paid for the bonds the amount charged to them as the price of the bonds, and they do not appear to have before understood the precise ground of the infirmity of the bonds. This suit is brought by the orator, as

survivor, to set aside the transaction, rectify the account, and recover the amount which would be due. It is resisted upon the ground that the remedy, if any, is at law and not in equity; that the next of kin or personal representatives of the deceased partner should have been made parties to the suit; and that the orator is not entitled to any recovery or relief.

It may be that the orator would have a remedy at law if entitled to relief here, but that is not decisive. The remedy there may not be so complete or convenient. Jurisdiction in equity is not understood as taken away by the statute, but as restrained merely within its usual limits. (*Boyce's Exrs. v. Grundy*, 3 Pet., 210; *Tayloe v. Merchants' Ins. Co.*, 9 How., 390; *Jones v. Bolles*, 9 Wall., 364.) The bill states that the price of these bonds was charged in accounts. The accounts produced in evidence show large transactions by the defendants for the orator's firm, in the sale of Government bonds, gold, and stocks, at the time of this transaction, the proceeds of which are credited against this and other charges. If this item should be taken out the whole account would be disturbed. There is not, probably, much doubt but that a bill in equity would lie for the adjustment of this account, if it was open. (1 *Story's Eq. Juris.*, § 462.) The relation of the parties was one of peculiarly great personal confidence, such as is there mentioned as a reason for resorting to equity. The propriety of the jurisdiction is as great when the account is opened for affording relief as it would be if the account had been left open. The controversy may be narrowed to this item, but that does not alter the nature of the case, involving the whole to reach the ultimate balance. (*Brookman v. Rothschild*, 3 Sim., 153.)

Upon the decease of the other partner, all the personal estate and assets, including debts and choses in action, survived to the orator. This would carry to him all right to these bonds, and to the balance due on the account, if the purchase of the bonds should be rescinded. The right of the next of kin or personal representative would extend only to the share of the deceased in the ultimate balance. The

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right of election to rescind, as well as the right to pursue any other course to ascertain and collect the assets, would seem to belong to him and not to them. (*Coll. on Part.*, *Wood's ed.*, § 796, *note.*) In *Scholefield v. Heafield*, (7 *Sim.*, 667,) the real estate of the deceased partner appears to have been involved, as a reason for joining the next of kin, and so such separate rights appear to have been involved in some other cases. Here there is no separate right of the deceased partner. The whole belonged to the partnership and the orator is invested with it.

What the interest of the defendants was in the bonds is the subject of some debate. Schepeler & Co. had or claimed to have some arrangement with an agent for the railroad company to furnish the iron. From the answer it appears that the defendants were to provide funds to pay for the iron, which they did. By the terms of the contract under which the bonds were deposited in bank, on the presentation of a warehouse receipt or ship delivery order for any lot of the iron, a joint order was to be given for the delivery to the defendants and Schepeler & Co. of so many of the bonds, at the then market price, as would equal the sum payable for the iron. The defendants presented receipts or orders for a lot of the iron, and received a joint order for 250 bonds, of 1,000 dollars each, the delivery of which to them they acknowledged November 11th, 1868, to sell at market price, to pay for their deliveries of the iron. No interest of Schepeler & Co. in the bonds appears or is claimed. The iron amounted to \$167,098 73 ; the bonds, at market price, to somewhat less. Their interest, therefore, was that of pledgees for sale, but to an amount equal to the value of bonds, and they were, substantially, owners of the bonds.

The extent to which they acted, on their own discretion, as agents, or under the direction of the orator's firm, as principals, is, also, somewhat questioned. Several communications had passed about these bonds, and the price and time of payment. The defendants sent information that the price would be about 65 *per cent.*, for \$100,000, cash, and asked if they

should buy at any time before revocation, and send the bonds. They were answered affirmatively but not to send the bonds. This direction was kept in force; the officers and agents of the railroad company agreed to a sale at $64\frac{1}{2}$ per cent., a purchase at that price was reported, the charge made for the price, and the bonds kept, the difference in amount being an equalization of interest.

The orator's firm did not so direct as to leave the defendants without agency in the transaction of the business. They understood, and had the right to understand, that the defendants were acting for them without any adverse interest. The defendants were, in reality, sellers while they assumed to act for the purchasers. Their charge was "To bot. \$100,000 6% North Carol. bonds, \$63,125." This was a charge as for money paid for the orator's firm to purchase the bonds, instead of, as the fact was, for bonds sold to the orator's firm. The bonds were not poor from the insolvency of the State of North Carolina; they were the result of unconstitutional legislation, not the bond or obligation of the State at all, nor recognized as such by any department of the State. The defendants did not know that the bonds were void; they supposed them to be good, and were not blamable for not knowing that they were bad. They were declared void by a divided Court, but the proceeding in which the decision was made directly affected the bonds, and was as fatal to them as the most glaring defect. This result became known in North Carolina and New York soon after this transaction.

The orator's firm did not get what was bought. They bought bonds as binding obligations of the State; what they got contained no obligation, and were not bonds of the State. They were like counterfeit notes or bills; the supposed maker was not holden. The subject of the sale did not exist, and there could be no valid or binding sale. This is elementary. (2 *Kené's Com.*, 468.) Had the orator's firm known that the defendants were the sellers, and learned that the bonds were void when the defendants did, there seems

to be no doubt that the transaction might then have been repudiated by them. But, as they were left by the defendants to suppose the transaction was, there was no way open to them for avoiding it as to the defendants. As the transaction in fact was, a charge of the bonds as sold would have failed; as the transaction was left to appear to them, the charge for money paid for the bonds would be valid.

Further, had these bonds been all that they were supposed to be, the defendants could not act for themselves as sellers and for the orator's firm as purchasers, and make a valid sale of them. The attempted contract of sale would fail, for want of parties to it, unless something should take place afterwards to make it good. This, also, is elementary. (*Story on Agency*, § 211.) There never has been any delivery of the bonds, nor anything done with them to confirm any contract. They have always remained with the defendants, and whatever has been done about them has been done by the defendants in their own names. Neither the orator nor his deceased partner has ever ratified the purchase as a purchase from the defendants; for, the deceased partner, so far as has been shown, never knew of it, and, when the orator became informed of it, he repudiated it. The rights of the parties appear to be the same now as at first.

The rights of the defendants growing out of the character of the bonds have all been preserved, apparently, by their own vigilance. It has been urged that they might have held on to the iron if the purchase of the bonds had been repudiated immediately, and that, therefore, they cannot now be placed as before. But, the orator's firm had nothing to do with the iron. That had relation to their obtaining, and not to their disposing of, the bonds. Had they given notice of the transaction as it was, and that they wished to follow the iron unless the sale was approved, it might have been different in this respect; but nothing of this kind was done. The *status quo* as between these parties relates only to the bonds, and to the charge of the money paid for them. That is easily regained.

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The question here is not whether the defendants undertook to palm off worthless bonds; they doubtless understood that they were rendering the money's full worth; but where this loss should fall. By the law as here understood, as applied to the facts as they are made to appear, it should fall upon the defendants.

Let there be a decree setting aside the sale, and for a resettlement of the accounts, with costs.

Joseph H. Choate, for the plaintiff.

Charles M. Da Costa, for the defendants.

WILLIAM F. FOSTER

vs.

DANIEL GOLDSCHMIDT AND OTHERS. IN EQUITY.

If a licensor under a patent refuses to fulfil any of his obligations in matter of substance, a Court of equity will not interfere to assist him, by compelling the licensee to observe his obligations.

Where the licensor agrees to use reasonable diligence in prosecuting infringers, his failure to prosecute some infringers of whose conduct the licensee has complained will not be regarded as a violation of the agreement, if, by successfully prosecuting other infringers, he has practically stopped the infringement.

Under an agreement by the licensor, that if any license shall be granted the conditions of which are more liberal, the licensee shall be entitled to receive the benefit of such additional advantages, he cannot insist on accepting those terms of the new license which are more favorable to him and rejecting those which are more onerous, but is entitled only to have a new license which, taken in all its parts, is more favorable to him.

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After rejecting the new license, the licensee cannot be heard to allege that its terms were more advantageous to him.

An agreement that the licensor shall finish, "by the application of lacing studs, or hooks and lacings," gloves furnished to him by the licensee, gives the election to the licensor as to the mode of finish.

Where the parties to an ambiguous document have acted upon a certain construction of it, that construction, if in itself admissible, will be adopted by the Court.

(Before WALLACE, J., Southern District of New York, July 17th, 1884.)

WALLACE, J. This cause has been heard upon the pleadings. The pleadings set out, copiously, matters of evidence in support of the allegations. The bill of complaint is filed to restrain the defendants from selling gloves bearing lacing studs and lacings which have not been applied to the gloves by the complainant, in violation of an agreement made between the defendants and the complainant, June 6th, 1876, whereby the complainant licensed the defendants to use certain patented hooks and lacings for gloves, when applied to the gloves by the complainant.

The conditions of the license agreement, so far as they are material to the present suit, are as follows: The complainant, in consideration of the payment of certain royalties by the defendants, allows the defendants to sell gloves containing the patented invention, provided the gloves have had their lacing studs, or hooks and lacings, applied by the complainant. Article 3 of the agreement provides, that, whenever the defendants desire to have gloves finished by the application of lacing studs, or hooks and lacings, at least sixty days before the work of finishing is to be commenced, they are to notify the complainant, stating when they will commence to furnish the gloves to be finished, and the number they will furnish each week. Article 4 provides, that, after the beginning of the time mentioned in the notice, the defendants are to furnish the gloves to be finished to the complainant, according to the terms of the notice, "which gloves shall be ready to be finished by the application of lacing studs, or hooks and lacings." Article 5 provides, that all gloves

thus furnished to complainant he shall cause to be finished by the application of lacing studs, or hooks and lacings, using the same material and care as he may use in finishing his own best quality of gloves, and shall return said gloves to the defendants within two weeks after he receives them. Article 12 provides, that the complainant shall use reasonable diligence in prosecuting, or causing the prosecution of, unlicensed persons who sell imitations of the gloves hereby licensed. Article 17 provides, that, if any license shall be thereafter granted under said patent, the terms and conditions of which are more liberal towards the licensee than those herein contained, the defendants are to be entitled to receive the benefit of the additional advantages.

The defendants admit, that, since August 7th, 1883, they have been selling gloves with the lacing studs and lacings which have not been applied by complainant, but they insist upon their right to do so, upon the theory that the complainant has violated some of the conditions on his part, contained in the agreement.

Concededly, if the complainant has refused to fulfil any of his obligations in matters of substance under the license, a Court of equity will not interfere to assist him, by compelling the defendants to observe the obligations upon their part.

They allege that he has not used reasonable diligence in the prosecution of infringers under Article 12 of the agreement, "in that, prior to November, 1881, many persons were systematically selling large quantities of said laced gloves, without any license, in the city of New York;" that, prior to that time, they had notified him that numerous houses in the city of New York were then selling—among them, A. T. Stewart & Co.; Haines, Bros.; Wilmerding & Co.; Eggebrecht & Bernhardt, and others—and requested him to take steps to prevent such sales; and that he neglected and refused to prosecute such parties, or any of them.

The bill of complaint alleges the commencement of seven suits against parties selling such gloves in the city of New York, between October, 1881, and May, 1882, and sets out

the proceedings and their result, sufficiently to show that the complainant exercised reasonable diligence and good faith. The answer admits that five of these suits were commenced, and that injunctions were obtained in four of them. Without attempting to particularize the allegations of the bill and answer in reference to this branch of the controversy, it will suffice to state, that, although it must be conceded that the complainant failed to prosecute several infringers whose conduct was complained of by the defendants, it nowhere appears that any of these parties continued to infringe after the complainant had brought suits against other infringers in the same city. There is a general averment in the answer, that, during the whole time of the continuance of the license, the complainant refused to prosecute sellers whose sales were injuring the defendants; but this allegation refers to sales made by licensed parties, and, by the terms of the agreement, the complainant only undertook to prosecute infringers. If the action of the complainant was such that it resulted practically in stopping infringement, he fulfilled the spirit and the meaning of his obligation to the defendants to use reasonable diligence in prosecuting unlicensed sellers. There are two controlling facts bearing upon this question, which stand admitted; first, that all the infringements of which the defendants complained, and now complain, took place prior to November, 1881; and, second, that, after the suits were brought by the complainant, the defendants continued to recognize the agreement as binding until June, 1883, when they placed their right to repudiate it upon another ground. The reasonable deduction from all the facts, as they appear upon the pleadings, is, that the complainant used reasonable efforts to stop infringements; that, within a few months, these efforts were successful; and that his conduct was acceptable to the defendants until other causes of disagreement arose.

The defendants contend that the complainant has refused to allow them the benefit of additional advantages granted to other licensees subsequently to the license to the defendants.

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It was upon this ground that they insisted the complainant should furnish their gloves with the new appliances invented by him subsequent to the date of their license; and, upon his refusal to do so, they undertook to finish their gloves themselves, and to use the new appliances therefor.

The pleadings show, that, after the license to the defendants was granted, the complainant devised and patented improvements upon the old appliances; that in May, 1883, he transferred to Foster, Paul & Co., his business and his patents, reserving, however, such an interest therein as would enable him to carry out his agreements with his existing licensees; that thereupon he notified the defendants that they could elect to have their gloves finished by him under the existing agreement, as theretofore, or they might surrender their license and receive from Foster, Paul & Co., a new license, under which that firm would finish the gloves with the new appliances; that, accompanying said notice, the complainant sent to the defendants the form of the new license to be issued by Foster, Paul & Co.; that this license provided that the licensees should be entitled to have the new appliances used in finishing their gloves, and also contained conditions in some respects more favorable, and in others less favorable, to licensees, than those of the old license. The defendants refused to accept the new license, insisted that the complainant should furnish their gloves with the new appliances, and notified him, that, if he refused to do so, they should supply themselves with the new fastenings, and finish their own gloves therewith; and thereupon, the complainant having refused to comply with their demands, they adopted the course they had indicated they should adopt.

The position of the defendants, therefore, is this: they insist that they are entitled to be furnished with the new appliances, by the complainant, on the terms of the old license, and, while they demand the benefit of the more favorable terms of the new license, they refuse to accept those which are more onerous. The error of this theory originates in a

radical misconception of the meaning of the agreement. The defendants are entitled to the additional advantages offered by a new license only when the terms and conditions of the new license are more liberal for the licensee than those of the old license. The obvious purpose of the condition was to put the defendants on an equality with any future licensees. If, taken in all its parts, the new license is not more favorable to the licensee than the old, the occasion does not arise upon which the condition becomes operative.

It cannot be determined, as a matter of law, or as a question of fact, that the new licenses offered by the complainant in the name of Foster, Paul & Co., were more liberal in their terms towards licensees than were the old ones. The defendants evidently considered that they were not, because they refused to accept the new license. The complainant gave the defendants the option of deciding whether they preferred the new license to the old one; and, after the defendants elected to refuse the new one, they cannot be heard to allege that its terms were more advantageous to them. Instead of accepting its benefits *cum onere*, they insisted upon determining for themselves what parts they would accept and what they would reject. If this were permissible, instead of being placed upon an equality with the new licensees they would enjoy superior privileges to them. Such a result was never contemplated by the agreement, and is opposed to any legitimate interpretation of its terms.

The defendants also contend, that, by the terms of their license agreement with the complainant, they were entitled to have their gloves finished with lacing studs, or lacing hooks, at their option, and that the complainant has refused to finish their gloves with studs. The fallacy of their position consists in construing an option belonging to the complainant as one belonging to them. Article 5 of the agreement is the covenant on the part of the complainant in reference to finishing the gloves for the defendants, and obligates him to "cause them to be finished by the application of lacing studs, or hooks and lacings." If there were nothing else than the lan-

guage of this condition to resort to for construction, it would seem clear that the promise of the complainant would be performed by applying either lacing studs or hooks. The promise is in the alternative, and the election is with the promisor. The ancient case cited in *McNitt v. Clark*, (7 Johns., 465,) where the obligor promised to pay £20, or 20 bales of wool, established the rule. As stated by Redfield, Ch. J., in *Mayer v. Dwinell*, (29 Ver., 298,) "a promise in the alternative puts the alternative in the election of the promisor, unless there is something to take the case out of the general rule." There are other provisions of the agreement which enforce this interpretation of the condition, and indicate that the complainant was to determine whether lacing studs or hooks should be applied. Such are the provisions which require the defendants to give notice in advance, to the complainant, of various details relating to the finishing of the gloves, but are silent as to the kind of fastenings to be applied.

But, perhaps, the most satisfactory reason for construing the condition as indicated, is the construction the parties have placed upon it themselves by their conduct, until this controversy arose. Where both parties have acted upon a certain construction of an ambiguous document, that construction, if in itself admissible, will be adopted by the Court. (*Pollock, Cont.*, 392.)

These considerations dispose of all the important questions in the case. There is no reason to suppose that the defendants have desired to disregard the complainant's rights, but they have acted upon a false construction of the agreement.

A decree for an injunction and an accounting is ordered for the complainant.

Livingston Gifford, for the plaintiff.

Hamilton Wallis, for the defendants.

THE YALE LOCK MANUFACTURING COMPANY

vs.

THOMAS L. JAMES. IN EQUITY.

Re-issued letters patent, No. 8,788, granted to the Yale Lock Manufacturing Company, as assignee of Silas N. Brooks, administrator of Linus Yale, Jr., July 1st, 1879, for an improvement in post office boxes, on an application made May 14th, 1879, (the original patent having been granted to said Brooks, as administrator, September 19th, 1871, and re-issued July 9th, 1872, on an application made May 7th, 1872, and again re-issued April 24th, 1877, on an application made April 19th, 1875,) which were the subject of decision in *Yale Lock Mfg. Co. v. Scovill Mfg. Co.*, (18 Blatchf. C. C. R., 248,) again considered.

The first and second claims of the re-issue must be so construed as to require the metallic front of the boxes to be made continuous by rivets, bolts or fastenings which attach the frames both to the woodwork and to each adjoining frame.

There was no mistake, defect or insufficiency in the description or claims of the original patent.

In the course of the application for the original patent, the applicant abandoned clauses making the attachment of the frames to each other optional.

(Before SHIPMAN, J., Southern District of New York, July 21st, 1884.)

SHIPMAN, J. This is a bill in equity, based upon the alleged infringement of re-issued letters patent, No. 8,788, dated July 1st, 1879, which were issued to the plaintiff, as assignee of Silas N. Brooks, administrator of Linus Yale, Jr., for an improvement in post office boxes. The original patent was issued to said Brooks, as administrator, on September 19th, 1871, and was re-issued three times. The first re-issue was applied for May 7th, 1872, and was issued July 9th, 1872; the second was applied for April 19th, 1875, and was issued April 24th, 1877; the third was applied for May 14th, 1879.

The invention was described, and the original patent and the third re-issue were recited, in the opinion, which was filed in June, 1880, in the case of the present plaintiff against the

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Scovill Manufacturing Company, (18 *Blatchf. C. C. R.*, 248.) The first of the two claims of the first re-issue was the first claim of the original patent. The second of said claims was as follows: "The combination of two or more metallic frames and doors and locks with pigeon holes, said frames having flanges, which protect and enclose, wholly or in part, the front edges of said pigeon holes."

The defendant, as postmaster in the city of New York, and not otherwise, used in the post office, provided and equipped for him by the United States Government, wooden post office boxes, with metallic fronts and doors, and open at the rear. They were manufactured by the Johnson Rotary Lock Company. The doors and door frames made a continuous metallic frontage. The door frames were secured to each other and to the woodwork as follows: At about the middle of each vertical edge of each door frame there was a triangular hole, which, with the corresponding hole in the adjoining door frame, made a rectangular hole, through which the metal fastening bolt, completely filling such hole, was passed, the heads of such bolts overlapping the contiguous edges of adjoining metallic fronts, and the bolt itself passing through the wooden partition between the adjoining pigeon holes, and being secured at the back thereof, within the post office room, by a nut screwed upon the end of the bolt. There were other boxes, constructed substantially as above described, excepting that the metal front of each pigeon hole was fastened to the woodwork by means of flanges and screws, but the screws which attached the frames to the woodwork did not attach the frames to each other.

Neither series of boxes would have infringed either claim of the original patent. Each series infringes the 1st and 2d claims of the present re-issue, unless these claims are to receive a construction which shall compel the metallic frontage to be made continuous by rivets, bolts or fastenings which shall attach the frames both to the woodwork and to each adjoining frame. The plaintiff insists that these claims should not receive such a construction, because it has been found that

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the invention of the specification of the re-issue, although a broader one than was described in the original patent, is the invention which the history of the art and the patent show should have been described, and because the first re-issue was promptly applied for, and, as issued, included in its second claim, in the view of the plaintiff, the same invention which is described in the 1st and 2d claims of the re-issue.

The defendant says, among other things, that, since the cases of *Miller v. Brass Co.*, (104 U. S., 350,) and *James v. Campbell*, (*Id.*, 356,) it has been settled by the Supreme Court, that the Commissioner of Patents, in allowing the 1st and 2d claims, exceeded his jurisdiction, because the invention, which was first applied for and was "complete in itself," was clearly, specifically and fully described in the original specification and in the claim, and an expanded claim would necessarily include an invention which was not sought to be described in the original patent; and, furthermore, that there could have been no inadvertence or mistake, because the original patent and the accompanying documents show that the patentee "did not intend it" (the patent) "to embrace any such broad invention" as was described in the re-issue. The defendant also says, that the patentee, in his application for the first re-issue, ineffectually endeavored to alter the description of the invention, so as to omit the fastening of the door frames to each other as a necessary integral part of the invention, and that the second claim of the first re-issue cannot fairly be construed to permit such omission, and, therefore, that the patentee is estopped from insisting upon a broad construction of the 1st and 2d claims of the present re-issue, and that these claims are objectionable on account of the laches of the patentee. The "file wrapper and contents" of the first re-issue were not a part of the record in the Scovill case.

It is unquestionable, that the patentee, when he made his original application, intended to say that his invention did not consist simply in making, by his combination of metallic doors, door frames and wooden boxes, a continuous metallic

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frontage, but that it also consisted in the way in which the frontage was made continuous, viz., by the connection of the adjoining frames with each other. His definite and exact specification shows that he supposed that his patentable invention was thus limited. He described with precision and clearness, that his metallic frontage was to be so constructed that the frames were to be fastened to each other at top, bottom and sides, and not merely to the woodwork. "A specific invention, complete in itself," was described, "fully and clearly, without ambiguity or obscurity." Under the definitions which are given in the decisions which have been referred to, and in *Manufacturing Co. v. Ladd*, (102 U. S., 408,) of the inadvertence, accident, or mistake which permits a re-issue, when a patent is said to be inoperative on account of a defect or insufficiency in the specification, which arose through such inadvertence or mistake, and also of the nature of the defectiveness or insufficiency which is meant by the statute, there was no mistake, although the patentee might have fallen into an error of judgment, or into an erroneous conclusion of fact; and, furthermore, the original patent, according to the definitions contained in the recent, and, perhaps, in the earlier cases, was not defective nor insufficient, either in its descriptive portion or in its claims.

The second claim of the first re-issue, construed in the light of the contemporaneous facts which are shown in the "file wrapper and contents," cannot be fairly construed to mean a metallic frontage irrespective of the fastening of the frames to each other through the woodwork. Were this claim to be construed without study of the history of the application as it made its way through the Patent Office, and of the amendments which it was compelled to undergo, it would probably receive the construction which naturally belongs to the first claim of the present re-issue. But, the patentee abandoned, under pressure from the Patent Office, the clauses in the application which made the fastening of the frames to each other to be optional, and abandoned also a proposed third claim, which described the box frames as secured to the

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pigeon holes "independently of each other, by means of screws or other similar fastening." In view of the fact that the Patent Office excluded from the descriptive part of the specification suggestions of any other method of fastening than that by which the frames were to be fastened to each other, it would be singular if the intent of the Office was to include in the second claim such other method of construction. If this claim has properly, and the applicant knew that it was intended to have, a narrow construction—and of this knowledge I think there can be little doubt—the plaintiff would not insist that the 1st and 2d claims of the present re-issue ought, in view of the decision in *Miller v. Brass Co.*, (*supra*.) to be so construed as to be any broader than the third claim, which requires the combination of door frames, doors and pigeon holes to be by means of rivets or bolts which attach the frames both to the woodwork and to each other.

There is no infringement, and the bill is dismissed:

Frederic H. Betts, for the plaintiff.

Samuel B. Clarke, (*Assistant District Attorney*.) and
George Andrews, for the defendant.

THE AMERICAN DIAMOND DRILL COMPANY

vs.

THE SULLIVAN MACHINE COMPANY. IN EQUITY.

Claims 2 and 3 of re-issued letters patent, No. 3,690, granted to Asahel J. Severance, as assignee of Rudolph Leschot, October 26th, 1869, for an "improved rock drill," (the original patent having been granted to Leschot, July 14th, 1863,) namely, "2. The row of cutting edges α' , when attached to a revolving boring head, so as to project beyond the circumference thereof, for the purposes specified. 3. In combination with a revolving and progressing boring head, having cutting points projecting beyond the periphery thereof,

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a hollow central drill rod, through which the water is forced or passed," are void, the claim of the original patent, namely, "The tool for boring or cutting rock or other hard substances, composed of an annular or tubular stock or crown, armed with a series of diamonds, and operating substantially as herein specified," having limited the invention to an annular crown, which would necessarily bore an annular hole, having a central core.

There was in the original patent no error through inadvertence, accident or mistake, nor was there any defectiveness or insufficiency in the specification. For the above reasons, the bill was dismissed, after the report of the master was made on an interlocutory decree for the plaintiff.

(Before SHIPMAN, J., Southern District of New York, July 21st, 1884.)

SHIPMAN, J. In 1875, this Court passed an interlocutory decree enjoining the defendant against the further infringement of the second claim of re-issued letters patent, No. 3,690, granted to Asahel J. Severance, as assignee of Rudolph Leschot, October 26th, 1869, for an "improved rock drill." The original patent was issued to Leschot, and was dated July 14th, 1863. The interlocutory decree was subsequently modified so as to enjoin against the infringement of the third claim of the re-issue. An accounting has been had before a master, whose report now comes for confirmation, and the case is ready for a final decree. Exceptions have been taken on both sides to the report, but all the exceptions are overruled, and the report is confirmed, as containing a correct finding upon the questions which were referred to the master.

The important question is, whether, under the recent decisions of the Supreme Court, the 2d and 3d claims of the re-issue are valid, and whether the final decree should not be for a dismissal of the bill. (*Fourniquet v. Perkins*, 16 How., 82.)

The invention, the second and existing re-issue, and the infringing device, were described in the opinion in the case of *The American Diamond Rock Boring Co. v. The Sullivan Machine Co.*, (14 Blatchf. C. C. R., 119.) The descriptive part of the original patent was substantially the same as the corresponding portion of the present re-issue. The single claim of the original was as follows: "The tool for boring or cutting rock or other hard substances, composed of an annular

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or tubular stock or crown, armed with a series of diamonds, and operating substantially as herein specified."

The defendant's device had, instead of an annular boring head, a convex boring head, armed with diamonds, and with two holes on its surface for the passage of water. By this device, the entire portion of the rock which is acted upon by the tool is abraded.

The second and third claims of the present re-issue are as follows: "2. The row of cutting edges *a'*, when attached to a revolving boring head, so as to project beyond the circumference thereof, for the purposes specified. 3. In combination with a revolving and progressing boring head, having cutting points projecting beyond the periphery thereof, a hollow central drill rod, through which the water is forced or passed."

The plaintiff insists that Leschot's actual invention was a revolving and progressing boring head armed with cutting points projecting beyond its periphery, so that they will cut a hole of larger diameter than that of the boring head, and will give a clearance, and a hollow drill rod, adapted, by reason of its tubular form, to permit the injection of water through the orifice in the boring head, to wash away the detritus, and, further, that Leschot described in the original patent the manner in which the diamonds were placed, so that a larger diameter was given to the hole than that of the boring head. Both these positions are true. The plaintiff then says, that the original claim did not limit the patent to an annular boring head, but expressly included a tubular one, so that a convex head was included in the patent as originally granted, and, therefore, that the new claims of the re-issue are not an expansion of the original. The plaintiff understands "the words 'annular or tubular' to mean that the head may be annular, so as to leave a core, or tubular, so as to permit the passage of water, and that, in any case, the head must be tubular, in the sense of a passage through it for the flow of water."

If the claim of the original patent did limit the invention, as patented, to an annular crown, which would necessarily bore

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an annular hole, leaving a central core, the plaintiff admits that the second and third claims of the re-issue are an enlargement of the original patent, and, being contained in a re-issue which was granted six years after the date of the original patent, are void.

The sole idea of Leschot, when he obtained his original patent, was, that he had a tool which bored an annular groove, leaving a central core or kernel. He did not see that his invention was broader than his statement of it, and could be made very useful for channelling or cutting from the quarry blocks of marble or rock, by making a series of holes which did not leave a core. But he presented his invention to the Patent Office as one which had the single office, so far as its cutting character was concerned, of boring annular holes or grooves, and which was so constructed as to leave a central core within the hole or groove. He said, indeed, that the operation of his tool would be assisted by the injection of a stream of water through the tubular boring bar, for the purpose of washing out the detritus, but this sentence or paragraph makes it plain that he considered that the chief function of the tubular crown was to make an annular hole which should have a core. The stock must be annular, and, being annular, it could admit a stream of water through the hollow bar. The claim of the original patent was not intended to enlarge the descriptive part of the specification, but to describe, compactly and tersely, the very invention which he had previously described more at length; and the words "annular or tubular," in the claim, are synonymous, and were intended to convey the same idea which the patentee had expressed in the descriptive part of the specification. Therefore, if the patent was to include a convex boring bar, and so include the actual invention, it must be re-issued.

But, the intent of the patentee having been to apply for and obtain a patent for an annular stock, and not for a tool which did not leave a core, and the specification and the claim, having been framed so as clearly, accurately and precisely to describe the annular tool, and no other, there was in the origi-

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nal patent, according to the modern decisions, no error which had arisen through inadvertance, accident or mistake, nor was there any defectiveness or insufficiency in the specification. The interlocutory decree was right, according to the theories of the law which were generally accepted in 1875. It is wrong as the law now stands.

The decree dismissing the bill for the reason herein set forth will be settled, if desired, upon hearing.

Edmund Wetmore, for the plaintiff.

E. T. Rice and *Alvan P. Hyde*, for the defendant.

CHAUNCEY P. WILLIAMS

vs.

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

The curative Act passed by the Legislature of New York, (*chap. 345, Laws of 1883*.) to validate void tax assessments made by the assessors of the city of Albany, in the years 1876, 1877 and 1878, on shareholders in a national bank, is valid.

The fact that the tax payers have not been given an opportunity to be heard until after paying their taxes, does not make the Act invalid.

(Before WALLACE, J., Northern District of New York, July 22d, 1884.)

WALLACE, J. This action is brought to recover certain taxes assessed against the plaintiff and several assignors of the plaintiff, in the years 1876, 1877 and 1878, and collected by the defendant. The persons thus assessed were stockholders of the National Albany Exchange Bank, of the city of Albany. The assessors omitted in those years to place the names of the shareholders upon the assessment roll in accordance with the requirements of the State laws regulating assessments; and it was held by this Court, in *Albany City Nation-*

al Bank v. Maher, (19 *Blatchf. C. C. R.*, 175,) that such omission rendered the tax illegal, because the requirement which was disregarded by the assessors was designed to afford tax payers an opportunity for the examination and revision of their assessments, and, therefore, should not be deemed directory merely, but essential, and a condition precedent to the validity of the tax.

It is insisted, for the plaintiffs, that the taxes thus collected were illegal for the additional reason, that the assessors violated the rule of uniformity prescribed by § 5,219 of the Revised Statutes of the United States, which prohibits the taxation of shares in national banks at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State.

This contention rests upon the fact, that the assessors habitually and intentionally adopted the practice, in assessing individuals upon bank shares held by them in various banks of the city of Albany, of estimating the value of the shares at par, and assessing them at that valuation, less a deduction of the assessed value of the real estate of the bank, although, as a matter of fact, the value of such shares differed in different banks, so that, while the shares in all the banks were really worth more than their par value, the shares in some of them were worth less than the shares in others. It does not appear affirmatively that this rule of valuation, thus adopted, operated to assess the shares of the stockholders here higher in proportion to their value than moneyed capital generally. It was applied alike to shares in State banks; and it is not shown how the capital of individual bankers was valued. The action of the assessors may have been a palpable violation of their duty under the laws of the State; and it has been so characterized in the opinions of the Judges of the State Courts, when the validity of the assessments has been questioned; but it does not follow that it was an unfair discrimination against shareholders of national banks, and, therefore, in contravention of the Federal law. The question, however, is not an open one in this Court, it having been decided adversely to

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the plaintiff, upon the same state of facts, in *Stanley v. Board of Supervisors*, (21 *Blatchf. C. C. R.*, 249.)

The disposition which must be made of this question is fatal to the plaintiff's case, because the case does not turn upon the point of the illegality of the original assessments. That point has already been decided in favor of the plaintiff. The case turns upon the efficacy of the curative Act passed by the Legislature of the State, to validate the assessments in controversy. (*Chapter 345, Laws of 1883.*) Undoubtedly, the Legislature could not validate a tax which was prohibited by the laws of the United States; but it was competent for them to sanction retroactively such proceedings in the assessment of the tax as they could have legitimately sanctioned in advance.

The Act of 1883 is the second legislative attempt to validate the taxes in dispute. The prior Act (*Chap. 271, Laws of 1881*) was adjudged by this Court, in *Albany City National Bank v. Maher*, (20 *Blatchf. C. C. R.*, 341.) unconstitutional, because it was, in effect, a legislative assessment of a tax upon a body of individuals, without apportionment or equality as between them and the general body of tax payers. The fatal vice of the Act was the denial of an opportunity to those assessed to be heard and permitted to obtain the deductions and corrections allowed by the general system of assessments.

The present Act is carefully framed to obviate the objections which were fatal to the former Act. It legalizes and confirms the assessments contained in the assessment rolls for the several wards of the city of Albany for the years 1876, 1877 and 1878, and on file in the office of the receiver of taxes, subject to the right of the parties interested to claim any deduction from, or cancellation of, the assessments, to which they would have been entitled under the laws existing when the respective assessments were made; and it provides for a reasonable notice and a reasonable opportunity for the parties to be heard, and to obtain such deductions or remission of the tax as may be just. It also provides for res-

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titution to all the parties of any sum improperly included in the tax, with interest from the time the tax carried interest.

The only objection to the validating Act which seems to deserve consideration is found in the circumstance, that the tax payers have not been given an opportunity to be heard until after they were compelled to pay their taxes. The general rule has often been declared, that the Legislature may validate retrospectively any proceedings which they might have authorized in advance; and it is immaterial that such legislation may operate to divest an individual of a right of action existing in his favor, or subject him to a liability which did not exist originally. In a large class of cases this is the paramount object of such legislation. If, therefore, it was within the competency of the Legislature to provide for the collection of a tax by a system which requires the tax payers to pay in advance of an opportunity to be heard, but which permits them to have a subsequent hearing, and to obtain restitution if restitution ought to be made, the validating Act was constitutional.

Under the power of taxation the property of the citizen is appropriated for the public use to the extent to which he should contribute to the public revenues, and he is liable to have a demand established against him on the judgment of others regarding the sum which he should justly and equitably contribute. He cannot be deprived of his property, even under the power of eminent domain, without due process of law, or, in other words, without notice and an opportunity to be heard, and this is an essential requisite of every lawful proceeding which affects rights of property or of person. In judicial proceedings, due process of law requires a hearing before condemnation, and judgment before dispossession; but, when property is appropriated to the public use under the power of eminent domain, or under the power of taxation, different considerations from those which prevail in controversies between individuals obtain. Thus, when property is taken under the power of eminent domain, by the State, or by municipal corporations by State authority, the adjudications

sanction the validity of laws which permit the property of the citizen to be appropriated before a hearing, and before compensation. It is sufficient if provision is made by the law, by which the party can obtain compensation, and for a hearing before an impartial tribunal to award the compensation; and it is assumed by the decisions in these cases, that the property of the municipality is a fund to which he can resort without risk of loss. (*Cooley's Const. Lim.*, 560, 561.) There seems to be no reason for a different rule when the money of the tax payer is appropriated by the sovereign power under the right of taxation. The reason why a right to be heard respecting the imposition of a tax is valuable and essential for the protection of the tax payer, is in order that he shall not be obliged to bear a disproportionate part of the public burden. If the taxing laws secure him in this right as effectually as is deemed sufficient in laws authorizing his property to be taken under the power of eminent domain, it would seem, upon analogy and upon principle, that he is protected sufficiently, and that the taxing laws would not contravene the constitutional prohibition.

Undoubtedly, it is beyond the power of the Legislature to validate the acts of taxing officers of a character which cannot be justified as an exercise of the taxing power; as, where a part of the property in a taxing district should be assessed at one rate and a part at another, or, if persons or property should be assessed for taxation in a district which did not include them; and it is stated in general, by a text writer of high authority, that a validating act cannot cure the illegality of an assessment made without any notice to the persons interested. (*Cooley on Taxation*, 227, 228.) The case of *Marsh v. Chesnut*, (14 Ill., 223,) and *Billings v. Detten*, (15 Id., 218,) are referred to as sustaining the proposition. Those were cases where the curative Act was held bad for the same reason that the curative Act of 1861 was held to be nugatory by this Court—because it did not provide for an assessment upon notice to the tax payer, and thus perpetuated the vice of the original assessment. The present Act, as has been said, is

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framed to obviate this objection. No adjudged case has been cited by counsel, or has met the attention of the Court, where such an Act has been considered. It is asserted, in many cases, that notice and an opportunity for a hearing of some description are matters of constitutional right; but it has nowhere been declared that it is indispensable that the hearing should be one in advance of the collection of the tax. The operation of the present Act is to preserve substantially to the tax payers the right of which they were originally deprived; to give them an opportunity to question the justice of the assessment; and to restore to them the sums which were illegally collected of them. In view of the large and almost unlimited discretion which resides in the Legislature, to regulate the mode and conditions of taxation, it is believed to be valid and effectual to legalize the proceedings here.

Judgment is ordered for the defendant.

Hale & Bulkley, for the plaintiff.

Peckham & Rosendale, for the defendant.

GEORGE H. WOOSTER vs. CHARLES W. HANDY. IN EQUITY.

In April, 1881, this Court made an interlocutory decree, (8 Fed. Rep., 429,) adjudging re-issued letters patent No. 6,568, granted to George H. Wooster, July 27th, 1875, (on an application for a re-issue filed June 22d, 1875,) for an "improvement in machines for making ruffles," (the original patent, No. 37,550, having been granted to Pipo and Sherwood, January 27th, 1863, on the invention of John A. Pipo,) to be valid, so far as claims 1, 7, 8 and 10 were concerned, and to have been infringed; and adjudging re-issued letters patent No. 6,566, granted to said Wooster, July 27th, 1875, (on an application for a re-issue filed July 19th, 1875,) for an "improvement in sewing machines for making band-ruffling," (the original patent, No. 46,424, having been granted to E. C. Wooster, February 14th, 1865, on the invention of Thomas Robjohn,) to be valid, so far as claims 8 and 9 were concerned, and to have been infringed; and awarding accounts of profits and damages, and perpetual

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injunctions. During the accounting, and in view of the decisions in *Miller v. Brass Co.*, (104 U. S., 350,) and *James v. Campbell*, (*Id.*, 356,) the defendants applied to the Court to reconsider the question of the validity of the re issues: *Held*,

- (1.) The Court has power to vacate the interlocutory decree;
- (2.) The right to re-issue the Pipo patent was lost by the delay of more than 12 years, the case being one of a mere expansion of the claims beyond anything stated in the original patent as the invention, and with no proof of mistake or inadvertence, and it being sought to make the new claims embrace structures brought into use between the time of the issue of the original patent and the time of the application for the re-issue, and which were not infringements of the claim of the original patent; and the re-issue was invalid as to claims 1, 7, 8 and 10;
- (3.) In the Robjohn re-issue, new matter was introduced, and the re-issue was taken to cover devices which did not infringe the original patent, and was invalid as to claims 8 and 9.

The bill was dismissed.

(Before BLATCHFORD, J., Southern District of New York, July 22d, 1884.)

BLATCHFORD, J. This suit is brought on two re-issued patents. One is re-issue No. 6,565, granted to George H. Wooster, July 27th, 1875, (on an application for a re-issue filed June 22d, 1875,) for an "improvement in machines for making ruffles," (the original patent, No. 37,550, having been granted to Pipo and Sherwood, January 27th, 1863, on the invention of John A. Pipo.) The other is re-issue No. 6,566, granted to George H. Wooster, July 27th, 1875, (on an application for a re-issue filed July 19th, 1875,) for an "improvement in sewing machines for making band-ruffling," (the original patent, No. 46,424, having been granted to E. C. Wooster, February 14th, 1865, on the invention of Thomas Robjohn.) The case was brought to a hearing on pleadings and proofs, and a decision was rendered, in April, 1881, (*Wooster v. Blake*, 8 *Fed. Rep.*, 429,) in favor of the plaintiff, on both patents, on which an interlocutory decree was entered, April 30th, 1881. The decree adjudged that No. 6,565 was valid so far as claims 1, 7, 8 and 10 were concerned; that those claims had been infringed; and that an account of profits and damages should be taken as to such infringement. It stated that, as No. 6,565 had expired by its own limitation, no injunction was granted

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in reference to it. The decree also adjudged that No. 6,566 was valid so far as claims 8 and 9 were concerned; that those claims had been infringed; that an account of profits and damages should be taken as to such infringement; and that a perpetual injunction should issue as to said claims. The decree further said: "No adjudication is herein made as to any other claims than those above mentioned, of either of said letters patent, in any respect," and it reserved the question of costs, and of increase of damages, and all further questions, until the master's report should come in.

The defendant's rufflers involved, and held, by the decision, to infringe both patents, were known as the Johnston ruffler and the Toof ruffler, and were sold to be attached to sewing machines, for ruffling purposes. In regard to the Pipo patent, No. 6,565, the decision considered several patents and inventions set up on the question of novelty, and held that they could not avail. On the defence of the invalidity of the re-issue, as not for the same invention as the original, the decision said: "There is no evidence that anything is found in the re-issue No. 6,565, which is not to be found in the description or drawing of the original patent, or in the model accompanying the application for that patent."

As to the Robjohn patent, No. 6,566, the decision considered the question of novelty, and sustained the patent. Although the defence that the re-issue was not for the same invention as the original was set up and urged, and it was considered, and overruled, no special observations were made, in the decision, in regard to it. The remarks in regard to the Pipo re-issue were considered as applying to it.

Some progress was made in taking testimony on the accounting before the master, when, on the 9th of January, 1882, the cases of *Miller v. Brass Co.*, (104 U. S., 350,) and *James v. Campbell*, (*Id.*, 356,) were decided by the Supreme Court. The defendant thereupon presented to this Court, on March 22d, 1882, a petition, with notice of an application to be made March 31st, 1882, that the prayer of the petition be granted. The application was adjourned and not heard till

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June, 1884. The petition states that 'the said decisions in 104 U. S. "fix and establish rules of law in respect to re-issues, different from those stated in numerous decisions of the Circuit Court of the United States for the Second Circuit in numerous earlier cases; that said decisions of the Supreme Court are directly in point, as affecting the validity of the said Pipo and Robjohn re-issues; and that the said Pipo re-issue and the said Robjohn re-issue must be declared void in accordance with the doctrines laid down in said cases." One of the prayers of the petition is, for a rehearing of the cause on the questions of law involved, in view of the said decisions of the Supreme Court, and that the interlocutory decree be opened.

The rehearing asked for is not such a rehearing as is the subject of Rule 88 of the Equity Rules prescribed by the Supreme Court. That rehearing is one after a final decree, after a decree which is of an appealable character. The present decree is not an appealable decree. The rehearing asked for is a reconsideration of the law of the case, on the question of the validity of the re-issues, in view of the decisions by the Supreme Court, referred to. The test applied by this Court, as announced by it, in deciding the case, was, that the re-issues were to be sustained, as to their claims, inasmuch as there was nothing found in them which was not found in the descriptions or drawings of the original patents, or in the models accompanying the applications for those patents.

The principle, the application of which is invoked by the defendant, is well settled. In *Perkins v. Fourniquet*, (6 How., 206, 209,) it is said, that interlocutory decrees remain under the control of the Court, and subject to its revision, until the master's report comes in and is finally acted upon by the Court, and the whole of the matters in controversy are disposed of by a final decree. In *Fourniquet v. Perkins*, (16 How., 82,) there were an interlocutory decree, an accounting under it, a report of a master, exceptions to the report, and an argument thereon. On the argument, the Circuit Court

reconsidered the opinion it had expressed on the merits in the interlocutory decree, and, believing that opinion to be incorrect, dismissed the bill. The plaintiff appealed to the Supreme Court, and that Court held the decree of dismissal to be right. It added: "The counsel for the appellants, however, objects to the decree of dismissal, because it was made at the argument upon the exceptions to the master's report, and is contrary to the opinion on the merits, expressed by the Court in its interlocutory order. But this objection cannot be maintained. The case was at final hearing at the argument upon the exceptions; and all of the previous interlocutory orders in relation to the merits were open for revision and under the control of the Court."

This Court, then, is to interpret the law of re-issues as it would have done if the cases referred to had been decided by the Supreme Court before this Court made its decision in this case. The rule laid down by the Supreme Court is, that where it is sought merely to enlarge a claim, there must be a clear mistake and inadvertence and a speedy application for its correction, with no unreasonable delay; that, in such a case, a patentee cannot wait until other inventors have produced new forms of improvement, and then apply for such an enlargement of his claim as to make it embrace those new forms; and that, when it is apparent, from a comparison of the two patents, that the re-issue is made to enlarge the scope of the patent, the Court may decide whether the delay was unreasonable, and the re-issue, therefore, void. This view has been repeatedly asserted and applied by the Supreme Court in numerous cases decided since those in 104 *U. S.*

As to the Pipo re-issue, No. 6,565, it is plain that the right to re-issue was lost by the delay of more than twelve years, because the case is one of a mere expansion of the claims, beyond anything stated in the original patent as the invention, and with no proof of mistake or inadvertence, and it is sought to make the new claims embrace, in this case, structures brought into use between the time of the issue of the original patent and the time of the application for the re-issue, and

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which were not infringements of the claim of the original patent. There was but one claim in the original. There are thirteen in the re-issue. It would serve no useful purpose to enlarge on this subject as to No. 6,565, for the counsel for the plaintiff concedes, that, under the reiterated decisions of the Supreme Court, this Court must dismiss the bill as to that re-issue.

But, in regard to the Robjohn re-issue, No. 6,566, the plaintiff contends that the case is different; that claim 2 of the original patent covered the defendant's structures; that claims 8 and 9 of the re-issue are substantially only repetitions of claim 2 of the original; or, that, at least, claim 2 of the original was so worded as to be ambiguous, and, so, inoperative, and claims 8 and 9 of the re-issue are valid, as removing the ambiguity. The specifications of the original and re-issued patents are as follows, the parts in each which are not found in the other being in italics:

Original.

"Be it known, that I, Thomas Robjohn, of the city, county and State of New York, have invented *a new and useful improvement in machinery for making band-ruffling; and I do hereby declare that the following is a full, clear and exact description of the same, reference being had to the accompanying drawings forming part of this specification, in which*

Re-issue.

"Be it known, that I, Thomas Robjohn, of the city, county and State of New York, have invented *certain improvements in machinery for making band ruffling, of which the following is a specification:*

This invention relates to improvements in rufflers for use with sewing mechanism, and consists in a ruffling blade or knife adapted to engage a strip of material to be ruffled, in combination with a feeding mechanism adapted to operate against the strip to which the ruffled strip is connected; also,

Original.

Figure 1 is a top view of my invention and of the bed-plate of a sewing machine, to which it is applied.

Figure 2, is a longitudinal, vertical section of the same.

Figures 3 and 3, are opposite end views of the ruffling machinery.*

Figures 4 and 4, are transverse sections of the band folder.*

Figure 5, is a top view of the guides without the ruffling knife.

Figure 6, is a section of the plaiting or ruffling device, parallel with Fig. 2, but showing the knife in a different position.

Figure 7, is a face view of a ruffle made by the machine.

Figure 8, is a transverse section of the same.

Re-issue.

in the combination, with a ruffling blade, of a guide for a strip to be ruffled, and also with a guide to fold and present a band about the edges of the ruffled strip, as is hereinafter more fully described, such folding guide also being adapted to hem or turn the edges of the folded band.

Figure 1 is a top view of the invention, showing its arrangement upon the bed-plate of a sewing machine. Fig. 2 is a longitudinal vertical section of the same. Figs. 3 and 3 are opposite end views of the ruffling machinery. Figs. 4 and 4* are transverse sections of the band folder. Fig. 5 is a top view of the guides without the ruffling knife. Fig. 6 is a section of the plaiting or ruffling device, parallel with Fig. 2, but showing a different position of the same. Fig. 7 is a face view of a ruffle made by the machine, and Fig. 8 is a transverse section of the same. Fig. 9 is a section of the presser, taken at right angles to the line of feed, showing the under surface cut away, to allow the passage of a hem on the ruffle.*

Original.

Similar letters of reference indicate corresponding parts in the several figures.

This invention consists in the combination, with a sewing machine, of a novel system of guides, and a plaiting or ruffling knife, whereby one strip of muslin or cloth has both edges turned in, and is folded longitudinally, to form a double band, and plaited or formed into a ruffle, and the band and ruffle are sewed together all at the same time, thus forming a double band ruffle at one operation.

To enable others skilled in the art to make and use my invention, I will proceed to describe its construction and operation.

A is the bed-plate of the sewing machine. B is the guide by which the turning in of the edges of, and the longitudinal folding of, the band *a* of the ruffle are performed, said guide being attached rigidly to the gauge-plate C, and secured to the bed-plate A by a screw, D, and steady-pins, *b, b*. This guide B is made of brass or other

Re-issue.

Similar letters of reference indicate corresponding parts in the several figures.

As illustrated in the drawings, one strip of muslin or cloth has both edges turned in, and is folded longitudinally, to form a double band, and another strip is plaited or formed into a ruffle, and the band and the ruffle are both sewed together at the same time, thus forming a band ruffle at one operation.

To enable others skilled in the art to make and use my invention, I will now proceed to illustrate the most complete and perfect form of its operation, as combined with a sewing machine.

At A is represented the bed-plate of a sewing machine. B is the guide by which the turning in of the edges of, and the folding of, the band *a* of the ruffle is performed, said guide being attached to the gauge-plate C, and secured to the bed-plate A, by a screw, D, and steady-pins, *b, b*. This guide B is made of brass or other metal, and has one end

Original.

metal, and has one end of the form of a tube, and nearly flat, as shown in figure 3, the width of the said tube being equal to the width of the strip of cloth of which the band, *a*, of the ruffle is to be formed, such strip being shown in section, in red color, in figures 4, 4*. At a short distance from the end shown in figure 3, one side of the tube is cut away, leaving the guide in the form of a transversely curved plate, with its edge turned over on the concave side, as shown in figure 4, and, toward the other end, its curvature increases, and the turning in of the edges is increased, until the plate is in the form of the letter V, or nearly double, and its edges have a complete double turn, as shown at *c, c*, in figure 4*, so that the strip, entering at the end shown in figure 3, and being drawn through, will come out folded along the centre, and with both edges turned in, as shown in red outline, in figure 4*.

The arrangement of this guide upon the sewing machine is such that this folding

Reissue.

formed as a tube, and of a width substantially equal to the width of the strip of cloth of which the band, *a*, of the ruffle is to be formed. The receiving end of this guide is shown at Fig. 3, and, at a short distance from such end, one side of said tube is cut away, leaving the guide in the form of a transversely curved plate, with its edge turned over on the concave side, as shown in Fig. 4, and, toward the other end, its curvature increases, and the turning in of the edges is increased, until the plate is in the form of the letter V, or nearly double, and its edges are given a double turn, as shown at *c, c*, in Fig. 4*, so that the band or plain strip to which the ruffle is to be united by stitches, when entered at the end shown in Fig. 3, and drawn through the guide, will come out folded along the centre, and both edges may be turned in or hemmed, as shown in Fig. 4*, provided the strip is wide enough to extend into and entirely fill the width of the guide. The arrangement of this guide upon a sewing machine is such that this folding

Original.

of the band may be effected *in the movement of the latter* toward the needle by the *ordinary feeder, r, of the machine.* The marginal portions, *c, c,* of the folder, by which the edges of the band are turned inward, do not extend quite to the needle hole, *d, but are cut away at some distance therefrom,* as shown at *s,* in *figures 1, 3** and *5,* though the *portion* which produces the central fold *extends* some distance beyond the needle hole, to preserve the form of the fold, while the stitching is being performed.

E is a guide for the strip of cloth of which the ruffle *e* is to be formed, consisting of a flat metal tube, of a width equal to that of the said strip, arranged in front of, and partly within, the folding guide B, parallel with the feed movement, to deliver the strip between the two edges of the band, as the latter *issues* from the said guide B, *and approach the needle.*

This guide has a slight downward inclination toward the needle, and its lower end rests on the bed-plate close to

Re-issue.

of the band may be effected *as the band is moved toward* the needle by the *feeding device, r.* The marginal portions, *c, c,* of the folder, by which the edges of the band are turned inward, do not extend quite to the needle hole, *d,* as shown at *s,* in *Figs. 1, 3** and *5,* though the *guide* which produces the central fold *has a nose, e,* extending some distance beyond the needle hole, to preserve the form of the fold *in the band,* while the stitching is being performed.

E is a guide for the strip of cloth of which the ruffle is to be formed, consisting of a flat metal tube, of a width equal to that of the said strip, *and it is shown as arranged* in front of, and partly within, the folding guide B, parallel with the feed movement, *and adapted* to deliver the *ruffled* strip between the two edges of the band *a,* as the latter *issues* from the said guide B.

The bottom plate, i, of the guide serves as the support for the strip or material to be ruffled, separates it from the

Original.

the feeding device and the needle hole, and its bottom part, i, is made with projections, f, f, to enable it to pass between and at the sides of the toothed surfaces of the feeding dog.

The upper part of the said guide has *near its sides* two longitudinal slits, *g, g*, commencing at a short distance from the end furthest from the needle, and extending to the end next the needle, *and the end of the tongue h, thus formed, is made to press upon the strip, in passing through the guide, and so keep it flattened, and produce friction enough upon it to keep it straight, on its way into the band.* The said tongue *h is shortened, so that it does not extend so near to the needle hole, by from a quarter to three-eighths of an inch, as the bottom part, i, of the guide, (see Fig. 2,) thereby leaving the said part i exposed for the plaiting or ruffling knife, F, to work upon, as will be presently described. This guide,*

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fabric to which it is to be united, and the ruffling blade, acting on such material to be ruffled, carries it forward over the support i, and presents it in a folded condition to the stitching mechanism. This bottom *plate, i, is made with projections, f, f, to enable it to pass between and at the sides of the toothed surfaces of the feeder r; and the upper part of the said guide has formed in it two longitudinal slits, g, g, commencing at a short distance from the end furthest from the needle, and extending to the end next the needle, the end of the tongue h, thus formed, being adapted to press upon the strip passing through the guide with sufficient force to keep it flattened and straight, on its way to the action of the ruffling blade.* The said tongue, *h, does not extend so near to the needle hole as the bottom plate, i, (see Fig. 2,) thereby leaving the said plate exposed for the plaiting or ruffling blade or knife to work upon, as will be presently described.*

Original.

E, is attached rigidly to the lower part of the guide B.

The plaiting or ruffling knife is made with a straight and moderately sharp, but not a cutting, edge, of a length equal to the width of the strip of which the ruffle is to be composed, the said edge being arranged at right angles to the feed movement. *The said knife is attached by an elastic shank, j, to a bent lever, G, the said shank keeping the edge pressed hard down upon the bottom part of the guide, and holding the knife with a downward inclination toward the needle hole, at an angle of about 30° to the surface of i.*

The lever, G, works on a fixed fulcrum, *t*, at the back of the bed-plate, and derives motion, in one direction, from the rod which works the needle arm, and, in the opposite direction, from a spring, I, or has imparted to it by any other mechanical means the necessary motion to produce a movement of the knife upon the bottom, *i*, of the guide, *E*, toward and from the needle hole, *d*. This movement of the lever may be varied by

Re-issue.

The plaiting or ruffling blade or knife is *generally* made with a straight and moderately sharp, but not a cutting, edge, of a length equal to the width of the strip of which the ruffle is to be composed, the said edge being arranged at right angles to the feed movement, *and connected with, or forming part of, an elastic shank, j, attached to a bent lever, G. In its forward movement, the edge of the ruffling blade or knife is pressed upon the support or plate, i, between the front part of which and the knife the strip to be ruffled is held.*

The lever, G, works on a fixed fulcrum, *t*, at the back of the bed-plate, and derives motion in one direction from the rod which works the needle arm, and in the opposite direction from the spring I, or has imparted to it by any other mechanical means the necessary motion to produce a movement of the blade or knife. This movement of the lever may be varied by means of a set screw, to give the knife a greater or less movement, ac-

Original.

means of a set screw, to give the knife a greater or less movement, according as finer, or not so fine, plaiting or ruffling is desired, the movement of the knife requiring to be as much greater than the feed movement as the intended width of the plaits. This knife commences its movement before the feed, and, when the knife has moved a distance equal to the intended *width* of the plaits, the feed movement commences, and the movement of the knife continues at the same speed as the feed movement, while the *latter* carries both band and ruffle *toward the needle*.

The presser, H, of the sewing machine to which my invention is applied, is made of a width sufficient to cover the whole width of the ruffle and a sufficient portion of the band; but it is made shorter than usual at the end where the work enters beneath it, in order to allow the knife to come close or nearly close to the needle, and its under side is beveled at that end, to allow the knife to pass under and push the plaits under it, as it gathers them up by its

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creasing as finer, or not so fine, plaiting or ruffling is desired, the movement of the knife requiring to be as much greater than the feed movement as the intended width of the plaits. This knife commences its movement before the feed, and, when the knife has moved a distance equal to the intended *widths* of the plaits, the feed movement commences, and the movement of the knife continues at the same speed as the feed movement, while the *feeding device* carries *forward* both the band, or *plain part* to which the ruffle is attached, and the ruffle.

The presser, H, which, as shown, is the foot of a sewing machine, is represented of a width *substantially equal to the width of the blade or knife*, or sufficient to cover the whole width of the ruffle and a sufficient portion of the band, but it is made shorter than usual at the end where the work enters beneath it, in order to allow the knife to come close or nearly close to the needle; and its under side is beveled at that end, to allow the knife to pass under and push the plaits

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movement toward the needle. The operation of gathering up the plaits is illustrated in Figure 6, where the strip which forms the ruffle is shown in red color.

The sewing machine in connection with which this invention is applied may be of any of the kinds in common use.

To set the invention in operation, the strip of cloth to form the band, *a*, is inserted through the guide B, and the longer strip to form the ruffle, (which has been previously hemmed along one edge,) is inserted through the guide E, and under the knife *F*, and with its hemmed edge in front or outward, and the ends of both strips brought under the presser, and, when the presser has been let down upon them, the machine is set in operation, as for ordinary sewing. As the two strips are drawn forward by the feed movement, the band is folded and has its edges turned in, and the

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under it, as it gathers them up by its movement. The lower surface is recessed or cut away at the side, as shown at *m*, in Fig. 9, to allow the hem of the ruffle, (Fig. 8,) to pass under without lifting the presser from the rest of the goods; and the foot is also recessed at *n*, to receive the band of the ruffle.

The sewing machine in connection with which this invention is applied may be of any of the kinds in common use.

To set the invention in operation, the strip of cloth to form the band, *a*, is inserted through the guide B, and the longer strip to form the ruffle, (which has been previously hemmed along one edge,) is inserted through the guide E, and under the ruffling blade or knife, and with its hemmed edge in front or outward, and the ends of both strips are brought under the presser, and, when the presser has been let down upon them, the machine is set in operation. The two strips are drawn forward by the feeding device, the band is folded and has its edge turned in, and the strip resting on

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ruffle strip is delivered into the fold of the band, and ruffled by the action of the knife, as hereinbefore described, and sewed into the band by the needle passing through both the upper and lower parts of the band close to the edges thereof.

In the ruffling operation, the knife *F* is prevented from acting on the under part of the band, by the extension of the lower part, *i*, of the guide *E*, beyond the upper part and below the knife, the said part of the band passing under the extended portion of *i*, and the ruffle strip passing over it for the knife to act upon, and the said extended portion protecting the lower part of the band from the action of the knife."

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the support i is ruffled, delivered to the unruffled material or the band, by the action of the knife, as hereinbefore described, and the ruffled and plain fabric are united by the stitching mechanism of the sewing machine, the needle, when operating with the band, passing through both the upper and lower parts thereof, close to the edges of the band.

In the ruffling operation, the blade or knife is prevented from acting on the band, or plain fabric beneath the ruffle, by the support or plate, *i*.

No claim is made to an open guide in combination with ruffling mechanism, as that is the form of gages which has been previously used; nor to a separating device, except in combination with the ruffling mechanism arranged and operated above the table.

The ruffled strip may be stitched, as formed, on to a plain fabric introduced under the guide *E*, and between the support or plate *i* and the feeder *r*, the latter engaging and moving the plain fabric with the ruffle attached, while the ruffling knife or blade engages only the strip to be gath-

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ered and carries it forward to the needle.

The end of the arm G carrying the ruffling blade is turned backward at g, moves back and forth above the guide, and permits the blade carried by such arm to operate under the edge of the plain unruffled material laid on top of the ruffled strip. As the blade moves forward, it first engages the material to be ruffled resting on the supporting and separating plate just at the end of the tongue, h, and, as the blade moves forward the material to be ruffled, its edge is held or pressed firmly against the material, and, when the fold made in the material is properly formed for the action of the needle, then the blade is retracted, and, as it returns to its backward position, the pressure of its end on the piece to be ruffled is lessened. The end of the ruffling blade moves beyond the edge of the supporting or separating plate, and carries the fold forward, in the ruffled strip, beyond the edge of said plate, and, on the return of said blade, the end of the supporting or separating plate, be-

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tween which and the blade the material rests, is held by the end of said plate i, preventing the blade, in its backward movement, from carrying back with it the fold formed in the strip to be ruffled.

I am aware that a rough surfaced feeder and ruffler have been employed to engage a piece of material to be ruffled, forming the gather in and moving the ruffled piece forward, the ruffler and feeder both engaging the ruffled strip, and, in connection with such mechanism, a separator has been employed, to separate a band from the ruffled strip, the band being laid on the surface of the ruffled strip engaged on its under side by the ruffler and feeder made as four-motioned feeding devices; and I am also aware of United States patent, No. 14,475.

I do not claim, as the invention of Thomas Robjohn, a flexible ruffling blade adapted to operate on a strip to be ruffled when sustained on the cloth-plate of a sewing machine; nor do I claim such a blade combined with a guide to present a single unfolded band strip to the ruffled strip;

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nor do I claim such a blade connected with and operated by a rocking arm or lever moved from a vibrating member of the needle-operating mechanism, and controlled as to its backward movement by a set screw; nor do I claim any of the specific combinations of devices claimed in an application filed June 22, 1875, for re-issue of United States patent, No. 37,550, granted to John A. Pipo, January 27, 1863, said combinations of devices, as expressed in such re-issue claims, being the invention of the said Pipo."

The original Robjohn patent had 2 claims, as follows: "1st. The combination with each other and with a sewing machine, of a guide for turning in the edges of and folding one strip of cloth to form a double band, a guide for guiding another strip of cloth into such band to form a ruffle, and a plaiting or ruffling knife, the whole operating substantially as herein specified. 2d. In combination with the ruffling knife acting above the strip which is to form the ruffle, I claim the extension of a portion of the bottom, *i*, of the guide E, or its equivalent, below the said knife, in such a position as to be interposed between the ruffle strip and the lower part of the band, substantially as and for the purpose herein specified."

The re-issue has 18 claims, as follows: "1. In a ruffling or plaiting mechanism, the combination of a ruffling or plaiting blade, with a folding guide, whereby a strip of any suit-

able fabric may be properly guided to form and fold a band about the edge of a ruffle, substantially as described. 2. The combination of a ruffling or plaiting blade, and folding guide for properly directing the strip to form and fold a band about the edges of a ruffle, with stitching or sewing mechanism, substantially as described. 3. In a plaiting or ruffling mechanism, the combination of a guide having an inclosed channel-way for properly directing the strip to be ruffled, with the plaiting or ruffling blade, substantially as described. 4. The combination of a plaiting or ruffling blade and an inclosed channel-way or guide for properly directing the strip to be ruffled, with a stitching or sewing mechanism, substantially as described. 5. The combination of a plaiting or ruffling blade and guide for properly directing the strip to be ruffled, and a folding-guide for conducting a separate strip to form and fold a band on the edge of the said ruffled strip, with sewing mechanism adapted to unite the band and ruffle, substantially as described. 6. The combination with a ruffling or plaiting blade, of a guide for conducting a strip to form a band for the ruffle, and adapted to fold or hem both edges of said band. 7. The combination of a ruffling or plaiting blade, a guide adapted to conduct a strip to form a band and to fold both edges of said band, with a sewing mechanism, substantially as described. 8. The combination of a ruffling or plaiting blade or knife, arranged and operated above the cloth-plate, with a supporting or secondary plate, separate from the cloth-plate, between which and the blade or knife the fabric to be ruffled is held and advanced by the blade, substantially as described. 9. A plaiting or ruffling blade arranged above the cloth plate of a sewing machine, and adapted to operate upon a surface other than such cloth-plate, whereby a strip of goods can be plaited or ruffled above a plain piece, substantially as described. 10. In a ruffling or plaiting mechanism, a presser or holder cut away at its lower side, to permit the passage of a hem, substantially as described. 11. A folding guide, adapted to conduct and fold a band, and provided with a nose or extended portion, to direct and hold the band after

it is folded, substantially as described. 12. The inclosed guide, in combination with the flexible tongue, adapted to press upon the goods passing through said guide, to keep said goods flattened and straight, substantially as described. 13. In a ruffling mechanism, the combination of a blade adapted to engage and fold or ruffle one piece of material, with a feeder adapted to engage and move forward the unruffled material on which the ruffled material is delivered and secured by stitching, substantially as described. 14. In a ruffling or plaiting mechanism, the combination of a plate adapted to separate the material to be ruffled from the unruffled material to which it is to be attached, with a reciprocating blade adapted to press upon and engage the upper side of the material to be ruffled, to move forward with such material and present a fold for the action of the needle, and, on the return stroke of the blade, to relax its pressure on the material to be ruffled, substantially as described. 15. The combination of the ruffling blade adapted to move forward beyond the end of the supporting or separating plate, with the separating plate adapted to retain the ruffled material from returning with the ruffling blade, substantially as described. 16. The combination of a guide adapted to control each edge of the piece to be ruffled, and a ruffling or plaiting blade having its edge extended across the material to be ruffled, with a solid or rigid pressing surface or holder, of a width to cover and flatten the ruffled or plaited material, substantially as described. 17. The combination, with a mechanism adapted to form a ruffle or plait, of a guide provided with an inclosed channel-way, to guide the strip intended to be ruffled or plaited. 18. The combination, with a separator and a ruffling blade, of guides adapted to control and present the band, forming edges both above and below the strip to be ruffled, whereby a piece of fabric may be ruffled between two surfaces."

The original Robjohn patent does not, anywhere in the statement of invention, or in any claim, suggest that his invention was anything else but the invention of mechanism for

making a band-ruffle by means of two automatic guides, one to fold in the band and the other to guide the strip to be ruffled; or that he had invented a separator plate, or any means of ruffling a strip above a plain piece. The statement of the invention, in the original patent, is, that it consists in combining the guides, and the knife, with a sewing machine, the result of the joint action being, that one guide, B, turns in both edges of a band and folds it longitudinally, so as to make a double band of it, and the other guide, E, which is a tubular guide, guides the strip to be ruffled, and delivers it between the two edges of the band, as they issue from the guide, B, and the knife makes the ruffle, and the two parts of the band and the ruffle are then sewed together by the needle, and a band-ruffle is formed. The real meaning of the original specification is best understood by seeing the alterations made in the re-issue. There is, in the latter, a statement that the invention "consists in a ruffling blade or knife adapted to engage a strip of material to be ruffled, in combination with a feeding mechanism adapted to operate against the strip to which the ruffled strip is connected." This is new, and is in addition to a combination of the knife and the two guides. In the original, the part *i* is the "bottom part" of the guide B; but, in the re-issue, it is called a plate, and a support, which separates the material to be ruffled from the fabric to which it is to be united. In the original, the guide E is said to be attached rigidly to the lower part of the guide B. This is omitted in the re-issue. In the original, the tongue *h*, of the guide E, is said to press on the strip to be ruffled so as to keep it straight "on its way into the band;" but, in the re-issue, the idea of the band in that connection is stricken out, and the pressure is said to be made to keep the strip straight "on its way to the action of the ruffling blade." In the original, the elastic shank, *j*, is said to press the edge of the knife down on "the bottom part of the guide;" but, in the re-issue, it is said to press it down on "the support or plate, *i*." In the original, the knife is said to have a movement "upon the bottom, *i*, of the guide E, toward and from the needle hole." In the re-

issue, the knife is said to have "a movement." In the original, "the feed movement" is said to carry "both band and ruffle toward the needle." In the re-issue, "the feeding device" is said to carry forward "both the band, or plain part to which the ruffle is attached, and the ruffle." In the original, it is stated that "the ruffle strip is delivered into the fold of the band, and ruffled by the action of the knife, as hereinbefore described, and sewed into the band by the needle passing through both the upper and lower parts of the band, close to the edges thereof." In the re-issue, it is said, that "the strip resting on the support, *i*, is ruffled, delivered to the unruffled material, or the band, by the action of the knife, as hereinbefore described, and the ruffled and plain fabric are united by the stitching mechanism of the sewing machine, the needle, when operating with the band, passing through both the upper and lower parts thereof, close to the edges of the band." In the original, it is stated, that, "in the ruffling operation, the knife, *F*, is prevented from acting on the under part of the band, by the extension of the lower part, *i*, of the guide, *E*, beyond the upper part and below the knife, the said part of the band passing under the extended portion of *i*, and the ruffle strip passing over it for the knife to act upon, and the said extended portion protecting the lower part of the band from the action of the knife." In the re-issue, it is said, that, "in the ruffling operation, the blade or knife is prevented from acting on the band or plain fabric beneath the ruffle, by the support or plate, *i*." These studied efforts to convert the bottom of the guide *E* into something other than the bottom of a guide, and into a supporting or secondary plate, dissevered from a guide, and to introduce the feature of ruffling a strip of goods above a plain piece, in addition to ruffling it in connection with a band which has two parts, an upper part and an under part, and thus to pave the way for introducing claims 8 and 9 of the re-issue, are supplemented by the introduction into the re-issue of the following new matter: "The ruffled strip may be stitched, as formed, on to a plain fabric introduced under the guide *E*, and between the support or

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plate, *i*, and the feeder, *r*, the latter engaging and moving the plain fabric with the ruffle attached, while the ruffling knife or blade engages only the strip to be gathered and carries it forward to the needle."

The internal evidence thus afforded by the patents is fortified by the external evidence. The plaintiff, George H. Wooster, became the owner, on June 1st, 1875, of the entire interest in the original Pipo patent. The interest in the Robjohn invention was vested in Mrs. Emma C. Wooster, the wife of the plaintiff, before the original patent was issued, and it was issued to her. On the 17th of June, 1875, she assigned her interest in it to the plaintiff. He applied for the re-issue of the Pipo patent on June 22d, 1875, and for the re-issue of the Robjohn patent on July 19th, 1875. In the Pipo case, the application was signed by both Pipo and the plaintiff, the new specification was signed by Pipo, and the oath to it was made by Pipo, June 21st, 1875. In the Robjohn case, the application was signed by the plaintiff, as assignee of Robjohn, the new specification was signed by the plaintiff, as assignee of Robjohn, and the oath to it was made by the plaintiff, July 17th, 1875. In that oath, the plaintiff deposed, "that he verily believes, that, by reason of an insufficient specification, the aforesaid letters patent granted to E. C. Wooster, as assignee of Thomas Robjohn, are inoperative; that the said error has arisen from inadvertence, accident or mistake, and without any fraudulent or deceptive intention, to the best of his knowledge and belief; that the entire title to said letters patent is vested in him; and that he verily believes the said Thomas Robjohn to be the first and original inventor of the invention set forth and claimed in the foregoing amended specification, and that the said Robjohn is now deceased." Although, as Robjohn was dead, the re-issue may have been properly made, under § 4,895 of the Revised Statutes, on an application made, and a corrected specification signed, by the assignee, the re-issue lacks the support which an oath by the inventor as to inadvertence, accident or mistake might afford to it.

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The circumstances under which the plaintiff applied for these re-issues, after he thus became the owner of the two patents, and the object he had in view, in doing so, are stated by himself. He was using the Pipo and Robjohn machines, in the business of making ruffles. His attention was called to the Johnston ruffler, and the Toof ruffler, as ruffling devices, to be attached to sewing machines; and he was applied to, to sell the Robjohn patent, owned by his wife. He then examined the matter, in connection with both patents, and concluded that they could be re-issued with the claims now in them, so as to cover such ruffling attachments. He then purchased the Pipo patent, and took an assignment of the Robjohn patent, and applied for the re-issues. The Johnston and the Toof rufflers were in the market. Patent No. 111,458, granted to Allen Johnston and William T. Johnston, January 31st, 1871, for an "improvement in gathering attachments for sewing machines," and patent No. 146,005, granted to Allen Johnston, December 30th, 1873, for an "improvement in gathering and ruffling attachments for sewing machines," describe and show the Johnston ruffler, as it is sued herein. No. 111,458 shows the features in it which are alleged to infringe claims 1, 7, 8 and 10 of the Pipo re-issue; and No. 146,005 shows the features in it which are alleged to infringe claims 8 and 9 of the Robjohn re-issue.

The defendant's ruffling attachments are alleged to infringe claims 8 and 9 of the Robjohn re-issue, because they have (1) a ruffling blade; (2) a secondary plate, separate from the cloth-plate of the sewing machine; (3) the cloth-plate, when in use, lying below the secondary plate, and the goods to be ruffled lying above the secondary plate, and between it and the blade, and a plain strip lying above the cloth-plate, and below the secondary plate, and between the two. The defendant's attachments do not have the combination claimed in claim 1 of the original Robjohn patent.

But it is contended for the plaintiff, that claim 2 of the original Robjohn patent was capable of being construed in two ways. It read thus: "2d. In combination with the ruf-

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fling knife acting above the strip which is to form the ruffle, I claim the extension of a portion of the bottom, *i*, of the guide, E, or its equivalent, below the said knife, in such a position as to be interposed between the ruffle strip and the lower part of the band, substantially as and for the purpose herein specified." It is said that the claim might have been construed as including in the combination only the part *i*, as being the part which really does the work of protecting the lower part of the band from the action of the ruffling knife; or it might have been construed as including not only the part *i*, but the tube E, with a covered top, from which the part *i* is extended, and which tube guides the piece to be ruffled. The argument is, that claim 2 was, therefore, defective, because it was obscure or ambiguous, and uncertain in meaning, and insufficient, in not clearly pointing out the invention desired to be covered; and that, in neither claim 8, nor in claim 9, of the re-issue is the tube or guide, E, an element.

Claim 2 of the original patent fully and clearly embodied the descriptive part of the original specification which was in these words: "In the ruffling operation, the knife F is prevented from acting on the under part of the band, by the extension of the lower part, *i*, of the guide E, beyond the upper part, and below the knife, the said part of the band passing under the extended portion of *i*, and the ruffle strip passing over it for the knife to act upon, and the said extended portion protecting the lower part of the band from the action of the knife." So far as claim 2 of the original patent was concerned, the specification of that patent clearly and accurately described the invention which that claim sought to cover, and, so far as such description was concerned, there was no defect or insufficiency, and the patent was not invalid or inoperative to cover anything arising out of such description which was set forth as an invention. There is no evidence that there was, in fact, any inadvertence, accident or mistake.

Taking the language of claim 2 of the original patent, in

connection with the descriptive part of the specification, the bottom, *i*, of the guide E, is the lower part of a tubular guide which has an upper part, and it must be interposed between the ruffle strip and the lower part of such a double band as is described. No other band than a double band is anywhere mentioned in the original specification. It is a strip folded longitudinally by the guide B, and having then an upper part and a lower part. It is folded along the centre of its width. The guide E is arranged in front of and partly within the guide B, and delivers the ruffle strip between the two edges of the double band. The two guides are rigidly attached together. One cannot be there to make the double band without the other being present. The ruffled strip, between the upper and lower parts of the double band, is sewed to them as the needle passes first through the upper part of the double band, then through the ruffled strip, and then through the lower part of the double band. It is the under part of this double band which is protected from the knife by the extension of the lower part, *i*, of the tubular guide E, beyond the upper part of that guide, because such under part of the double band passes under the extended portion of *i*. There can be no double band without the guide B, and the guide E is rigidly attached to the guide B, and, so, the extended part of the lower part, *i*, of the guide E, must be the extended part of the lower part of such a tubular guide as B is. There is no warrant, therefore, in the specification of the original patent, for extending the invention to cover the stitching of the ruffled strip on to a plain strip which is no part of a double band. The words "substantially as and for the purpose herein specified," in the original claim 2, refer to the purpose of protecting the lower part of a double band made by the guide B, by extending the lower part of the tubular guide E, which is rigidly attached to the guide B.

In view of the descriptive part of the original specification, claims 8 and 9 of the re-issue could not have been sustained on that specification. There was no obscurity or ambiguity in the original claim 2. It was warranted by the

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description. That description authorized no claim as to the extension of a portion of *i*, different from what was claimed, as here interpreted, and the only admissible amendment of the claim, by the description as it stands, would have been one to interpret it in the same sense.

These considerations bring the case, as to the Robjohn re-issue, within the decisions of the Supreme Court on the subject of re-issues. (*Gill v. Wells*, 22 Wall., 1; *The Wood Paper Patent*, 23 Id., 568; *Powder Co. v. Powder Works*, 98 U. S., 126; *Ball v. Langles*, 102 Id., 128; *Miller v. Brass Co.*, 104 Id., 350; *James v. Campbell*, Id., 356; *Heald v. Rice*, Id., 737; *Johnson v. Railroad Co.*, 105 Id., 539; *Banta v. Frantz*, Id., 160; *Wing v. Anthony*, 106 Id., 142; *Hoffheins v. Russell*, 107 Id., 132; *Gage v. Herring*, Id., 640; *Clements v. Odorless Excavating Apparatus Co.*, 109 Id., 641; *McMurray v. Mallory*, 111 Id., 97; *Turner & Seymour Mfg. Co. v. Dover Stamping Co.*, Id., 319.)

The bill must be dismissed as to both re-issues because of their invalidity as respects claims 1, 7, 8 and 10 of the Pipó re-issue and claims 8 and 9 of the Robjohn re-issue.

The application to introduce further evidence is granted as respects the two affidavits of the plaintiff and the files and contents in the matter of the re-issues, but is denied in the other particulars.

No reason is seen why the defendant should not recover the costs of the cause.

The same rulings are made as to the case against Thornton and others.

In the case against Blake and others, the application to introduce further evidence is granted in the respects above indicated and denied in the other particulars, and the suit as to them will proceed in course.

Frederic H. Betts, for the plaintiff.

Benjamin F. Lee, John Dane, Jr., and William H. L. Lee, for the defendant.

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THE MUTUAL LIFE INSURANCE COMPANY, OF NEW YORK

vs.

IRVING CHAMPLIN AND OTHERS. IN EQUITY.

In an interpleader suit, in equity, brought by a life insurance company against different persons claiming to own a policy issued by it, one of the defendants removed the suit into this Court, under clause 2 of § 2 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) alleging, in his petition, that the policy was his property. Another defendant moved to remand the cause, on the ground that there was but a single controversy in the suit, and that in that case a removal could be had only under clause 1 of § 2, and then only when all the plaintiffs or all the defendants should unite in the petition: *Held*, that the motion must be denied.

(Before Brown, J., Southern District of New York, July 23d, 1884.)

THE plaintiff, in March, 1879, insured the life of Edmund W. Raynsford, in the sum of \$10,000, by a policy made payable to his executors, administrators or assigns. The insured resided at Providence, R. I., and died there, in January, 1883. The defendant Champlin, a citizen of that State, was duly appointed administrator of his estate, and subsequently took out ancillary letters of administration in this State. The deceased left a widow and one son, Charles K. In March, 1881, he had assigned the policy to the defendant Sparrow. The validity of this assignment being contested by the administrator and the distributees of the estate of the deceased, the complainant filed a bill of interpleader, in the Supreme Court of this State, against all the above-named claimants of the insurance money, who are all non-residents of this State, offering to pay into Court the money due on the policy. The defendant Champlin removed the cause to this Court, upon his own petition, under the 1st clause of § 2 of the Act of 1875. On motion of the defendant Sparrow, the cause was remanded to the State Court, because all the defendants did

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not join in the petition, as required in a proceeding under the first clause, in which the word "party" is construed to mean all who are upon the same side of the controversy. Thereafter, the defendant Charles K. Raynsford, before answer, removed the cause to this Court, under the 2d clause, alleging, in his petition, that the "said policy is the property of this petitioner, by virtue of certain conveyances and transfers to him from said Edmund W. Raynsford; that all the defendants are citizens of States other than the State of New York, where the plaintiff resides; that there is a controversy in the suit which is wholly between citizens of different States, and can be fully determined as between them; and that the petitioner is actually interested therein." Thereupon, the defendant Sparrow made the present motion again to remand the cause, on the ground that there is but a single controversy in the suit, and that in that case a removal can be had only under the 1st clause of § 2, and then only when all the defendants or all the plaintiffs unite in the petition.

Hathaway & Montgomery and *H. G. Atwater*, for the motion.

W. H. Arnoux, Donald McLean and *Francis Lawton*, opposed.

BROWN, J. The second clause of the second section of the Removal Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) declares, that when, "in any suit between citizens of different States * * * there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants * * * may remove," &c. Here is an explicit declaration that the cause may be removed by either one of the plaintiffs or defendants, provided certain specified conditions exist. For the purposes of this motion, the averments of fact contained in the petition must be taken to be true; and the petitioner must be deemed, there-

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fore, to be a necessary party to the action. The suit, therefore, although containing but a single controversy, fulfils literally every one of the conditions of the second clause. Is the Court warranted in narrowing the scope of this clause by construction, and in annexing to it a condition not found in the statute, viz., that the suit must contain two or more controversies? I think not. The language of the 2d clause is, doubtless, designed to embrace suits which do contain two or more controversies; and to authorize a removal at the instance of any one plaintiff or necessary defendant, provided the necessary conditions exist as respects any one distinct controversy in the suit. That may be, possibly, its most useful purpose; as it is, doubtless, the purpose for which this clause has been most frequently invoked and applied. But it does not follow that such is its only purpose. The language used in no way restricts it to suits containing two or more controversies; nor is the language such as would naturally have been chosen, if such a restriction had been intended. Had such been the intention, we should expect to find some such words as, "When, in any suit *containing two or more controversies*, * * * there shall be a controversy which is wholly," &c., or some equivalent expression, indicating an intention to make such a limitation. The language actually chosen is such as applies equally to suits containing one controversy or several. In substance, the Court is asked to limit its effect by interpolating some such clause as that above italicized. Only clear and strong reasons could justify such a limitation of the clear language of the statute, by construction. The reasons urged seem to me insufficient.

It is said, that in no reported case has the 2d clause been applied to a suit containing but a single controversy. But it is equally true that there is no reported case to the contrary. It is but nine years since this clause was enacted. The question may not have been previously presented for decision; or the result may not have been thought of sufficient interest or importance to be reported.

It is further said, that the phrase, "and which can be

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fully determined as between them," indicates that several controversies are contemplated. That is true; since that phrase would be unnecessary where there is but a single controversy in the suit. But this only shows that the clause was designed to embrace suits which do contain two controversies, as well as suits which contain but one controversy; and that, when applied to a suit containing several controversies, the same conditions must exist as to that controversy which necessarily exist when there is but one controversy in the case.

Again, it is urged that this construction of the 2d clause leaves nothing for the 1st clause to act upon, and that thus the 2d clause would wholly supersede the 1st, since, if any one of several defendants or plaintiffs could remove a suit containing but a single controversy, under the second clause, there would never be any occasion to resort to the 1st clause, which requires all on the same side to join in the petition. It is a maxim in the construction of statutes, that some effect is to be given, if possible, to all their provisions, since all are presumed to have been intended to have some effect. The general words of one part of a statute must, therefore, sometimes be limited by construction, in order to give effect to specific provisions in another part. If the 2d clause of this section, applied according to its literal terms, would wholly supersede the 1st clause, the principle referred to would apply, and would require the two to be harmonized and made effectual by the application of some limitation to the 2d clause, which the context or the general purpose of the statute might indicate as the actual intention of Congress. But the 1st clause is not wholly superseded by the literal terms of the 2d. The latter clause applies only where there are several parties plaintiff or defendant; because its language is, "either one or more of the plaintiffs or defendants may remove," &c. There must be, then, at least two plaintiffs or two defendants. There is nothing in the language of the 2d clause which can be made to apply to the case of a single plaintiff and single defendant. But the 1st clause does cover the case of a single plaintiff and a single defendant, as well as of several plaintiffs

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and several defendants; and it, therefore, subserve at least one exclusive purpose. The result, therefore, is, that only the 1st clause will embrace suits having but a single plaintiff and single defendant; only the 2d clause will embrace suits having several plaintiffs and several defendants, and at the same time several controversies, some of which are of themselves removable and some not; while, in other cases where there are several defendants or several plaintiffs, all resident in different States from those on the other side, the proceedings for removal may be taken under either clause, whether the controversies in the suit be one or several. As each of the two clauses thus has some exclusive purposes to subserve, the fact that they overlap each other in other cases, like the present, in which an option exists to proceed under either clause, seems to me no sufficient reason for narrowing the scope of the 2d clause, by the interpolation of a condition not found in the statute.

If the point raised by this motion has not been expressly decided, it has been, at least, suggested by the Supreme Court, without deciding the question and without any adverse intimation, that a single controversy might possibly be removable under the 2d clause as well as under the 1st. (*Removal Cases*, 100 U. S., 470.)

The decisions upon the 2d clause are not inharmonious with the construction here given; and any different construction would involve anomalies altogether inadmissible. In the leading case of *Hyde v. Ruble*, (104 U. S., 407,) the Supreme Court, in defining when a cause is removable under the 2d clause, makes no mention of the existence of several controversies in the suit, as one of its conditions. The Court says: "To entitle a party to a removal under this clause, there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different States from those on the other." This requirement may be met as fully by a controversy standing alone, as by one joined with other controversies which are not by themselves removable. In the latter case, it is the con-

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stant practice, under the 2d clause, to remove the whole suit at the instance of a single defendant; and this is the use to which the 2d clause is most commonly applied. If the present suit, therefore, contained an additional controversy affecting the present defendants, and also other defendants who were citizens of the same State with the plaintiff, then, although the latter controversy would not by itself be removable under either the 1st or the 2d clause, yet, undeniably, the whole suit would be removable under the 2d clause, at the instance of either of the present defendants, by reason solely of the existence of the present controversy in the suit. But, if the present controversy is such as to make a whole suit removable by one defendant, though it contained another controversy not in itself removable, it must, in all reason, be removable in like manner when standing alone. It would be a gross anomaly to construe a statute in such a way as to mean, that a controversy, which, when joined with another controversy not removable at all, would be sufficient to remove both at the instance of a single defendant, would not itself be removable in the same manner when standing alone. Such a construction would make the removability of a suit under the second clause depend, not on the character of the removable controversy, but wholly upon its being joined with a controversy not in itself removable at all. It is not credible that any such anomaly should have been intended, and none such should be created by construction.

This view is further sustained by a comparison of the Removal Act of 1875 with the provisions of the Federal Constitution, and by the apparent intention of Congress, by this Act, to make provisions for the jurisdiction of the Federal Courts and the removal of suits between individuals, co-extensive with the grant of judicial power. The 2d section of Article 3 of the Constitution defines the cases to which the judicial power of the United States shall extend; among which are "controversies * * * between citizens of different States." Legislation was, however, necessary to give effect to this Article of the Constitution. Prior to the Act of 1875,

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Congress, by the Judiciary Act of 1789, and the Acts of 1866 and 1867, had dealt with this subject by piecemeal only, and far within the scope of the constitutional grant of power. The provisions of the Act of 1875, however, seem carefully drawn so as to cover the entire limit of the constitutional provisions, so far as these limits are clearly settled. The construction of the particular provisions of this Removal Act should, therefore, be in harmony with, and in furtherance of, that general intention, and not such as to defeat it. It is an unsettled question, whether the phrase "controversies * * * between citizens of different States" means a controversy which is wholly between citizens of different States, or whether it may include controversies in which some only, but not all, of the parties on opposite sides are citizens of different States. The question was elaborately argued, but not decided, in the case of *The Sewing Machine Companies*, (18 Wall., 553.) It was again referred to in *Blake v. McKim*, (103 U. S., 336, 338.) In *The Removal Cases*, (100 U. S., 479,) Justices Bradley and Swayne expressed the opinion that it embraces every controversy in which any of the opposing parties are citizens of different States; and, entertaining that view, they differed from the majority of the Court, and held that the word "party," in the 1st clause, should have a wider construction than the word "plaintiff" or "defendant," under the Judiciary Act, and should include any one of several plaintiffs or defendants, and not be limited to all jointly. The constitutional question was not, however, involved in the decision of the Court. In the 2d clause of § 2 of the Act of 1875, Congress has avoided controverted ground, by expressly limiting that clause to controversies "*wholly* between citizens of different States." Such controversies are undeniably within the constitutional grant of judicial power. And, where such a controversy does exist, it is plainly within the constitutional provision, that either one of the necessary defendants may be empowered to remove it. The reasons for this constitutional provision apply as much to each severally as to all jointly; nor is there any good reason why a defend-

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ant should not be allowed to remove the cause against the dissent of his co-defendant, as well as against the dissent of the plaintiff. The 2d clause of § 2 of the Act of 1875 fully recognizes this constitutional right of a single defendant, by providing that either one of the plaintiffs or defendants, in the cases stated, may remove the cause. When, therefore, a suit containing a single controversy is removable by reason of the residence of the opposing parties in different States, inasmuch as Congress has undeniably recognized the individual right of removal, and has expressly conferred that right on a single one of several co-plaintiffs or co-defendants, where another controversy, not in itself removable, is joined with it; and since, moreover, the 1st clause applies only to a "party," *i. e.*, to all jointly on the one side or the other; the 2d clause ought, if its language will permit, to be construed in furtherance of the general constitutional right of each individual to remove a controversy which is clearly a removable cause, as being within the presumed general intention of Congress, in framing the Act of 1875, to provide for removal according to the scope of the Constitution. There is no other clause of the Act which covers the case of a single controversy, so as to secure this constitutional privilege to each individual suitor. And, as the language of the 2d clause, instead of indicating any exclusion of cases having but a single controversy, appears rather to have been chosen so as to cover all suits having several plaintiffs or several defendants, which have either one controversy or several, it seems to me clear that this clause should not be narrowed by construction, but, should be applied, as its language imports, to both cases alike.

The motion is, therefore, denied.

GEORGE A. BAGLEY AND OTHERS

vs.

THE CLEVELAND ROLLING MILL COMPANY.

It is the duty of the Court to direct a verdict for the plaintiff, when the evidence is such that it would be its duty to set aside, as contrary to the evidence, a verdict for the defendant.

In an action to recover damages for a breach of warranty as to quality, on the sale of steel to be used in making vises, the warranty and the breach being established, the Court ruled that the plaintiff owed no duty to the defendant to test the steel before using it, and that there was no evidence to authorize the jury to find that the plaintiff discovered the defect in the steel before using it: *Held*, that this ruling was correct.

When a vendor agrees to fill an order for an article of a particular quality, his liability is the same as when he first makes a proposal to sell an article of that description.

The defects in the steel not being obvious on inspection, but latent, the use of it by the plaintiff did not affect his right of recovery for damages, it not being shown that he knew of the defects till he had used the steel and sold the vises made from it.

The proper damages were the cost of labor and the waste of material employed in making the vises, with interest from the commencement of the suit.

(Before WALLACE, J., Northern District of New York, July 26th, 1884.)

WALLACE, J. If the evidence introduced upon the trial of this case was such that it would have been the duty of the Court to set aside a verdict in favor of the defendant, as contrary to evidence, if such verdict had been rendered by the jury, then it was the duty of the Court to direct a verdict for the plaintiffs. (*Randall v. B. & O. R. R. Co.*, 109 U. S., 478; *Griggs v. Houston*, 104 U. S., 553; *Herbert v. Butler*, 97 U. S., 319.) The defendant's motion for a new trial presents the question whether the evidence was such as to require the case to be submitted to the jury according to the rule stated.

The plaintiffs sued to recover damages arising from a

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breach of warranty on the part of the defendant. The plaintiffs were manufacturers and sellers of vises, at Watertown, N. Y., and the defendant was a manufacturer of steel, at Cleveland, Ohio. In August, 1880, the plaintiffs wrote to the defendant, stating that they required steel for facing the jaws of the vises they were manufacturing, and detailing the characteristics which steel should possess for that purpose, and requesting the defendant to send them a sample to test. The defendant sent them a sample. It proved unsatisfactory, and the plaintiffs wrote to the defendant again pointing out the defects, asking for another sample, and stating that they could give considerable and continuing orders if the defendant could furnish a satisfactory article. The defendant sent other samples. Subsequently, the plaintiffs sent several orders for lots of steel, accompanied with explanatory suggestions to the defendant, and the defendant sent the lots ordered. The correspondence indicates that it was contemplated by both parties that the plaintiffs should experiment with these lots, in order to ascertain whether the defendant could supply them with the required article. October 22d, 1880, the defendant wrote to the plaintiffs as follows: "We have been trying to get a cast of steel out for your work, but are so busy that we can't do anything in way of experimenting, but will send same as before, if desired. If you desire us to send same quality as before, please reiterate your order." October 25th, the plaintiffs replied to this letter as follows: "Yours of 22d at hand. Give us same quality as last lot, and send as soon as possible 500 lbs. $\frac{1}{2}$ x $\frac{7}{8}$, 500 lbs. $\frac{5}{8}$ x 1, 500 lbs. $\frac{5}{8}$ x $1\frac{1}{8}$." November 6th, the plaintiffs wrote to the defendant again as follows: "Send us 500 lbs. steel, (same quality,) $\frac{1}{2}$ x $1\frac{1}{8}$. We are in great need of all stock ordered, and, if it proves satisfactory, on a fair trial, hope to give you much larger orders." Neither of these orders was filled by the defendant, owing to the defendant's inability to do so, and, November 20th, the defendant wrote to the plaintiffs, explaining the causes of the delay. November 22d, the plaintiffs wrote to

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the defendndant, referring to their former orders, and ordering two more lots of 1,000 lbs. each. Soon after this all the orders were filled by the defendant, and, after they were filled, and prior to March 5th, 1881, the plaintiffs ordered, and the defendant sent, four or five lots of steel. March 5th, 1881, the plaintiffs ordered 2,000 lbs., "same quality as last ordered," which order was filled by the defendant. March 30th, 1881, the plaintiffs ordered three tons, "same quality as last." This order was filled by the defendant, by a shipment of the quantity April 30th. All the lots sent by the defendant between November 22d, 1880, and this last order, including the steel sent upon the order of March 5th, proved satisfactory to the plaintiffs, but the steel sent to fill the order of March 30th proved a failure. Its defects were discovered before it was used, and, May 13th, the plaintiffs wrote to the defendant, as follows: "The steel shipped by you April 30th is a complete failure. You remember we want it for vise jaws, and require it to harden and take a temper when heated and plunged in water. What you have sent before has been good and satisfactory in this respect. We have tested some twenty or thirty pieces, and many took no temper at all, and some would harden in spots and be soft in other parts. We have tried it faithfully, in every way, with no better results. Of course, we cannot think of using it, as the tempering is the last process, almost, after all the work is expended on the vises. We see no other way than for you to duplicate the order with stock that will be right, and we return this lot to you." May 17th the defendant wrote to the plaintiffs: "We have investigated the complaint contained in your letter of the 13th, against the steel, and find that, through a misunderstanding here, we did not send the right thing. We have entered a new order, and will push it as fast as possible. Meanwhile, please return the lot you have to us." May 21st, the plaintiffs wrote to the defendant, stating that they had reshipped the lot for return, and saying: "We trust you will permit no delay in forwarding the duplicate order, of proper quality. We are out of stock and many of our men will be idle until it

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arrives." May 24th the defendant filled the order. The lot was received by the plaintiffs June 1st, and a large part of it was used for the vises. After it had been used and the vises sold, complaints were made by purchasers, and, upon investigation, it was ascertained that the vise jaws made from it were too brittle for practical use. Thereupon, tests were made of the unused steel, part of the lot in question, on hand, and it was found wholly unfit. These tests were made by taking samples of the lot and heating them and plunging them in water, when, by filing and striking them with a hammer, it was found they had not tempered, but were brittle. Thereupon, the plaintiffs promptly gave notice to the defendant, and sent to the defendant samples of the steel to test. After a long delay, the defendant's agent wrote to the plaintiffs, stating that he was satisfied that the defendant could not make steel of the kind required for the plaintiffs' purposes. The damages sustained by the plaintiffs in the cost of labor and the waste of material employed in the defective vises, together with interest from the commencement of the suit, were \$3,000.

The Court ruled, as matter of law, that there was an agreement on the part of the defendant that the steel should be of the same quality as the lots that the defendant sent to the plaintiffs between November 22d, 1880, and the lot sent upon their order of March 30th; that there was a breach of this agreement; that the plaintiffs owed no duty to the defendant to test the steel before using it; and that there was no evidence to authorize the jury to find that the plaintiffs, or those in their employ, discovered the steel to be defective before the vises were finished. If these rulings were correct, the motion for a new trial should be denied.

There was no conflict of testimony respecting the warranty. The plaintiffs' letter to the defendant, of March 5th, 1881, requested the defendant to send steel of the "same quality as last ordered." The defendant sent that lot of steel. March 30th the plaintiffs ordered three tons more, "same quality as last." The defendant undertook to fill that order, but failed

for the reason stated in the letter to the plaintiffs of May 17th : "through a misunderstanding here, we did not send the right thing." The defendant then made a second attempt to fill the order, and this, after being advised, by the plaintiffs' letter of May 13th, what the particular defects were, and what use the steel was required for, and that the steel sent before was unsatisfactory. There was, therefore, no room for any possible misconception or misunderstanding of the description and quality of the steel which the defendant was instructed to send. The question then is—did the transaction import an undertaking upon the part of the defendant to send to the plaintiffs steel of the quality theretofore sent and found to be satisfactory?

Although the term warranty is used as expressing, in a general sense, the nature of the defendant's undertaking, there was no warranty in the technical sense of the term. A warranty is an undertaking which, though part of the contract of sale, is collateral to the express object of it. A buyer has a right to expect an article answering the description in the contract, but this is not on the ground of warranty, but because the seller does not fulfil the contract by giving him something different. (Lord Abinger, C. B., in *Chanter v. Hopkins*, 4 M. & W., 399, 404; Martin, B., in *Azemar v. Casella*, L. R., 2 C. P., 677.) Such an undertaking is usually treated as a warranty, because the description of the article is deemed a representation that it answers the description. But, where there is a collateral representation, the rule obtains, that, in order to constitute a warranty, it must have been intended as such by the vendor, and understood as such by the vendee.

By assuming to comply with the plaintiffs' order, the defendant undertook to send to them steel of the same quality as that furnished upon their order of March 5th. The order of March 30th was the one which the defendant assumed to fill, and called for steel of the same quality as sent in response to the order of March 5th. The letters and orders of the plaintiffs subsequently were but reiterations of the original instruction to send steel of the same quality as was sent upon the order of

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March 5th. There was nothing for the jury to pass upon, and the question was one purely of law—whether the defendant undertook to furnish the plaintiffs with steel like that sent pursuant to the former order of March 5th. That it did so undertake is perfectly clear. The case, in its facts, is almost identical with *Gurney v. Atlantic & G. W. R. Co.*, (58 N. Y., 358.) The rule, that the sense in which an affirmation is intended, and whether it was understood and relied on as a warranty, are questions of fact for the jury, has no application to such a case, (*Wason v. Rowe*, 16 Vt., 525,) any more than to the case where an article is sold by a particular description. (*Hogins v. Plympton*, 11 Pick., 100; *Winsor v. Lombard*, 18 Id., 60; *Borrekins v. Bevan*, 3 Rawle, 23; *Richmond Trading Co. v. Farquar*, 8 Blackf., 89; *Hawkins v. Pemberton*, 51 N. Y., 204; *Dounce v. Dow*, 64 N. Y., 411.) When a vendor agrees to fill an order sent for an article of a particular quality, his liability is the same as when the proposition to sell an article of that description comes from him in the first instance; he is liable if the goods sent do not correspond with the description. (*Dailey v. Green*, 15 Penn. St., 118.)

The evidence was so conclusive that there was a breach of the undertaking of the defendant, that the jury would not have been authorized to draw a contrary inference. If all the steel had been used, there might have been a slight question whether or not some fault or error in working it had not been committed by the plaintiffs, although the testimony in their behalf was clear and uncontradicted, that they used ordinary care in working it; but the tests made with the steel which had not been used, the entire absence of testimony on the part of the defendant tending to attribute the result to any other causes than the defective quality of the article, and the defendant's subsequent implied admission of its defective quality, left the case of the plaintiffs free from any fair doubt.

If the plaintiffs had a right to rely upon the undertaking of the defendant that the steel was of the quality ordered, the latter certainly has no right to complain because the plaintiffs

acted upon that assumption. If there is a warranty of kind or quality, the purchaser has a right to assume the warranty to be true; and, therefore, he may sell with like warranty, and defend suits for the breach, and recover of the vendor his special damages in consequence of doing so. (*Clare v. Maynard*, 7 C. & P., 741; *Cox v. Walker*, *Id.*, 744; *Swett v. Patrick*, 12 Me., 9; *Ryerson v. Chapman*, 66 *Id.*, 561; *Lewis v. Peake*, 7 *Tunst.*, 153.)

The testimony undoubtedly shows, that, up to a certain period in the dealings between the parties, it was not certain that the defendant could supply the plaintiffs with the desired quality of steel, and that the plaintiffs were experimenting to ascertain whether the article sent would answer the purpose. But, after the plaintiffs had informed the defendant that certain lots had proved satisfactory, and gave an order for the same quality, the latter had no right to assume that future experiments would be made. After their letter of November 6th, there was nothing on the part of the plaintiffs to indicate their intention to make experimental tests. It is true, that, by their letter of May 16th, the plaintiffs notified the defendant that they had found the lot shipped pursuant to their order of March 30th unfit before using it, but the defendant was aware that this was not owing to any inherent difficulties in the article, but to its own fault in not sending the kind sent before, and, by acknowledging its mistake, plainly intimated to the plaintiffs that it could supply the required article.

It is held, in several cases, by the Court of Appeals of New York, that, upon an executory contract for the sale and delivery of personal property, the remedy of the vendee to recover damages on the ground that the article furnished does not correspond with the contract does not survive the acceptance of the article by the vendee, after opportunity to ascertain the defect. (*Hargous v. Stone*, 1 *Seld.*, 73; *Reed v. Randall*, 29 *N. Y.*, 358; *The Dutchess Co. v. Harding*, 49 *N. Y.*, 321.) The later cases in the same Court establish quite decided modifications of the doctrine. In *Gaylord Manufg. Co. v. Allen*, (53 *N. Y.*, 519,) the Court says: "It

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is not intended to express an opinion as to the rule in case there were latent defects, or those which could not be discerned at the time of the delivery or acceptance of the article." In *Gurney v. Atlantic & G. W. R. R. Co.*, (58 *N. Y.*, 358,) it is held not to apply when the defects cannot be ascertained by examination upon receipt of the article, but only upon use. In *Day v. Pool*, (52 *N. Y.*, 416,) and *Park v. Morris Ax & Tool Co.*, (54 *N. Y.*, 587,) the Court held, that, when there is an express warranty upon an executory contract of sale, the vendee is not bound to return, or offer to return, the article, but, after acceptance, and after the discovery of its defects, may retain it and recover upon the warranty. In the cases of *Hargous v. Stone* and *Reed v. Randall*, the defects in the article accepted by the vendee were obvious upon inspection, and, if the rule is confined to such cases, it is supported by some of the earlier English decisions and by *Sprague v. Blake*, (20 *Wend.*, 61.) The question is not much considered in *Hargous v. Stone*, but, in *Reed v. Randall*, the authorities are considered, and the cases of *Fisher v. Samuda*, (1 *Camp.*, 190;) *Grimaldi v. White*, (4 *Exp.*, 95;) *Milner v. Tucker*, (1 *C. & P.*, 15;) and *Sprague v. Blake*, (*supra*), are cited as holding that the remedy of the vendee does not survive the acceptance of the article after opportunity to ascertain the defect. The English cases were similar in their facts to *Sprague v. Blake*—cases where the defects were obvious upon inspection of the article accepted. Some of the early English cases hold, that the rule does not obtain where there is an express warranty, but Lord Ellenborough did not make such a distinction, and applied it to such a case, in *Hopkins v. Appleby*, (1 *Stark.*, 477.) Modern text writers of high authority do not adopt the unqualified proposition that the cause of action does not survive an acceptance after knowledge that the article is not in compliance with the condition of sale; but state that the silence of the vendee after acceptance, with knowledge of the breach of the contract, may be interpreted as a waiver of a right to complain, and may afford a presumption that the article was satisfactory. (*Story on Sales*, § 405;

Benjamin on Sales, § 901.) The law was stated by Comstock, J., in *Muller v. Eno*, (14 N. Y., 597,) as follows: "The omission of the purchaser to give notice or to make complaint, and the manner in which he deals with the goods, may furnish strong presumptions against him, upon the question whether the warranty is in fact broken, and in regard to the amount of the injury he has sustained. But this is a very different thing from saying that the law absolutely deprives him of relief." Undoubtedly, acceptance after knowledge precludes the vendee from exercising the right to rescind the sale, and the cases of *Day v. Pool* and *Park v. Morris Ax & Tool Co.*, place the rule upon its correct foundation in this respect. Manifestly, there is no distinction in principle, as to the rights and remedies of a purchaser, between a cause of action arising out of a breach of contract by the vendor to deliver an article of a specified quality or description, or out of the breach of a representation which is collateral to the contract, or out of such a breach when the representation or warranty is implied instead of being express. In either case, there is an agreement, in substance and purport, to the same effect; in either a breach of it works the same injury to the vendee; and in either the same presumption of fact arises from an acceptance of the article after discovery of its defects. Whether the cause of action is one for the breach of a contract or for the breach of a warranty is a mere matter of nomenclature, (*Hastings v. Lovering*, 2 Pick., 214;) and the breach of a promise implied by the law works the same consequences, imposes the same obligations, and creates the same rights, as the breach of an express promise. The language of the Court in *Wolcott v. Mount*, (7 Vroom, 262,) is apposite, and is accepted as a sensible and satisfactory exposition of the law, and is as follows: "The obligation rests upon the contract. Substantially, the description is warranted. It will comport with sound legal principles to treat such engagements as conditions, in order to afford the purchaser a more enlarged remedy by rescission than he would have on a simple warranty; but, when his situation has been changed, and the remedy by repudiation has become im-

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possible, no reason supported by principle can be adduced, why he should not have upon his contract such redress as is practicable under the circumstances. In that situation of affairs, the only available means of redress is by an action for damages. Whether the action shall be technically considered an action on a warranty, or an action for the non-performance of a contract, is entirely immaterial."

The defective quality of the steel received by the plaintiffs was not obvious upon inspection, and, as the fault was a latent one, their acceptance and use of it is not material, either upon the theory that their cause of action did not survive the acceptance, or that their conduct starts the presumption that it was a satisfactory article. Undoubtedly, the plaintiffs could have discovered the latent defects in the steel here if they had made a thorough test by heating and plunging it. The question, however, is not what they could have discovered, but what they did discover; and upon that question the testimony is decisive. Acting upon the assumption that the defendant had sent them the article ordered, there was, probably, a relaxation of their usual vigilance in testing its quality, but not a scintilla of evidence to show, or raise the inference, that they were aware of its defects until after it had been used and the vices in which it had been used had been sold in the market.

The damages sustained by the plaintiffs were such as it was reasonably to be anticipated by the parties would accrue, in view of the special use to which the plaintiffs were to apply the steel, if it proved unfit for the purpose. They ensued as the natural and ordinary consequence of the use of the steel in the manner contemplated by both parties.

Upon the authority of many analogous cases, the plaintiffs were entitled to recover to the whole extent of their actual loss. (*Hadley v. Baxendale*, 32 *L. J., Ex.*, 179; *Smeed v. Ford*, 1 *E. & E.*, 602; *Passinger v. Thornburn*, 34 *N. Y.*, 634; *Flick v. Wetherbee*, 20 *Wis.*, 392; *Van Wyck v. Allen*, 69 *N. Y.*, 61; *White v. Miller*, 71 *N. Y.*, 118.) It is undeniably true, that, when a party who is entitled to the benefit of a contract can save himself from a serious loss arising from a breach

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of it, by reasonable exertions, he will not be permitted to charge the delinquent with damages which arise in consequence of his own inactivity. (*Warren v. Stoddart*, 105 U. S., 229.) Good faith and good logic require that he be confined to a recovery of those damages only that arise from the default of the other party. If the plaintiffs here had had any just reason to suppose that the steel they were about to use was unfit for the purpose, they would not be permitted to shut their eyes to the probable consequences, and, when they proved disastrous, to fall back upon the defendant for indemnity. But, they are not to be deprived of compensation to the extent of their loss, upon the theory that they owed any active duty of investigation and experiment to the defendant. They had a right to assume that the steel sent them was what the defendant undertook to send them, and no implication of negligence on their part can be indulged, in the absence of testimony to indicate that its unfitness was observed before it was used. None was offered, and the case rested on the uncontradicted testimony of the employes of the plaintiffs, all of whom testified that no defects were noticed during the process of using the steel.

Upon the whole case, the conclusion is reached, unhesitatingly, that the defendant cannot fairly complain of the rulings at the trial. There were no disputed facts, and no disputable inferences from the facts shown, upon which a verdict for the defendant, or a recovery of a less amount of damages, would have been warranted; and it would have been the duty of the Court to set aside such a verdict if it had been found by the jury.

The motion for a new trial is denied.

C. D. Wright, for the plaintiffs.

Levi H. Brown, for the defendant.

ROBERT JACKSON, CLAIMANT OF 76,125 CIGARS, PLAINTIFF
IN ERROR

vs.

THE UNITED STATES, DEFENDANTS IN ERROR.

Under an information, under § 3,397 of the Revised Statutes, as amended by § 16 of the Act of March 1st, 1879, (20 *U. S. Stat. at Large*, 348,) for the forfeiture of cigars, as removed from the place where they were made without stamping the box with the number of the manufactory, and the number of the district, and the State, it was shown, at the trial, that the cigars were not made at the manufactory the number of which was stamped on the box: *Held*, that it was to be presumed the cigars were removed in the condition in which they were found.

Where a case is tried in a District Court by the Court without a jury, the exceptions to the findings of fact and law by that Court cannot be reviewed by the Circuit Court, on a writ of error.

(Before WALLACE, J., Southern District of New York, July 28th, 1884.)

WALLACE, J. This writ of error brings up for review a judgment by the District Court for the Southern District of New York, condemning, as forfeited to the United States, certain cigars which the information alleges were "manufactured in some manufactory, United States internal revenue collection district, and State, to the attorney for the United States unknown, and were removed from said manufactory or place where the cigars were made, without stamping, burning, or impressing into each box, in a legible and durable manner, the number * * * of the manufactory, and the number of the District, and the State."

Section 3,397 of the Revised Statutes, as amended by § 16 of the Act of March 1st, 1879, (20 *U. S. Stat. at Large*, 348,) declares, that, whenever any cigars are removed from any manufactory or place where cigars are made, without thus stamping into each box the number of the manufactory and the number of the district and State, they shall be forfeited.

The evidence showed that the boxes here were stamped with the words "Factory No. 120, Dist. Florida," but that, although there was such a factory at Key West, Florida, the cigars in suit were never manufactured at that manufactory. A label upon the boxes indicated that the cigars were made at Key West, in factory No. 120, September 4th, 1882.

If these cigars were made in, and removed from, any other manufactory in the United States, it is clear that they were not stamped with the number of the proper manufactory; and the case is directly within the statute, as they were not stamped with the number of the proper manufactory from which they were removed, at the time they were removed, or at any other time.

The plaintiff in error contends, that it was incumbent upon the Government to show affirmatively, that, when the cigars were removed from the factory in which they were made, they were not in boxes properly stamped; that proof of their being found in the boxes seized does not establish the fact that they were in them when removed from the factory; and that it is to be presumed, in favor of innocence, that they were taken out of the original and properly stamped boxes and put in those where they were when seized. The exceptions to the findings in the Court below raise this point, and it is the only point made by the exceptions, which has any color of merit.

The cigars could not have been removed from the original and properly stamped boxes, and packed in those in which they were seized, without violating some of the several stringent provisions of the internal revenue laws, and subjecting the offender to criminal punishment. The presumptions in favor of innocence, therefore, neutralize each other.

Undoubtedly, it is incumbent upon the Government, in such a case, to show affirmatively the existence of every fact which is an element of the act made penal. This rule, however, does not require every conjecture which may be started by the fertility of counsel to be overthrown. It suffices, if, upon the evidence in the case, the existence of the facts can

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be legitimately presumed. Aside from any presumptions founded upon the observance of the statutory regulations, the natural and reasonable inference is, that the cigars were removed from the factory in the condition in which they were found. It is not usual, after articles have been prepared for sale in the market, to remove the packages, wrappers, or boxes in which they are ordinarily prepared for sale, and substitute others unnecessarily. The presumptions drawn from the ordinary conduct of men and the usages of trade are often as cogent as direct evidence. They were sufficient here to make a *prima facie* case.

As the case was tried by the Court below without a jury, the exceptions raised by the plaintiff in error to the findings of fact and law by the District Judge cannot be reviewed, however meritorious they might be. (*Town of Lyons v. Lyons Nat. Bank*, 19 *Blatchf. C. C. R.*, 279; *Blair v. Allen*, 3 *Dill.*, 101; *Wear v. Mayer*, 2 *McCrary*, 172.) It has been deemed proper, however, to consider them, at the request of counsel, as they have been fully argued.

Judgment affirmed.

Abram J. Dittenhoefer, for the plaintiff in error.

Walter W. Adams, (*Assistant District Attorney*), for the defendants in error.

ANDREAS TEILMAN vs. OTTO PLOCK AND OTHERS.

In this case, demurrage, under a charter-party, for the detention of a vessel, was not allowed.

The duty of a charterer in respect to receiving cargo from the vessel, considered.

The charterer was not obliged to receive iron from the vessel, on a lighter, in the absence of proof of a usage to that effect.

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Where there are several consignees of cargo, no one of them can control the selection of the place of delivery.

(Before WALLACE, J., Southern District of New York, July 30th, 1884.)

THIS was a libel *in personam*, in Admiralty, filed in the District Court. After a decree for the respondents, (17 *Fed. Rep.*, 268,) the libellant appealed to this Court.

Franklin A. Wilcox, for the libellant.

Edward S. Hubbe, for the respondents.

WALLACE, J. This is a libel by the master of the Norwegian bark *Anna*, against the respondents, as consignees of part of the cargo, for demurrage, for three days' detention in discharging cargo.

The cargo was carried under a charter-party with one Wissman, and was consigned to several consignees, and consisted of empty petroleum barrels, iron rails and pig iron, the barrels being stowed on top. The respondents were the consignees of the iron rails only, and these were shipped under a bill of lading, which, after providing for the terms of freight, specified that the cargo should be discharged at the same place as the other cargo, to commence immediately after arrival of the ship, without delay, and "all other conditions as per charter-party with Mr. Wissman." The charter-party provided for loading and discharging the vessel with customary quick despatch, the cargo to be received and delivered alongside the vessel, within reach of her tackles, at consignee's risk and expense, lighterage, if any, to be borne by the cargo, and for demurrage at the rate of £9 per day, for each days' detention by default of charterer.

The bark arrived at the port of New York, August 30th, 1880, and proceeded to the Atlantic Docks, to discharge the barrels. The respondents were duly notified by the agent of the vessel owners, and asked to attend to the discharge of the rails as soon as the barrels should be dis-

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charged, and they promised to send a lighter to receive the rails, if they could obtain a custom house permit. On September 3d, the captain of the lighterman to whom the respondents had given a delivery order, left the order with the mate of the bark, promised to send a lighter as soon as she was ready to discharge the rails, and was informed by the mate that she would be ready the next morning between 9 and 10 o'clock. At that time she was not alongside the wharf, but was discharging the barrels while lying aside of another vessel. On Saturday, September 4th, the captain of the lighter called and got the order back again, took it away, and returned in the afternoon and stated that he could not get permission to discharge the iron from the custom house authorities, unless they were allowed to weigh it on the deck of the vessel. It was not customary to permit a discharge of iron upon a lighter unless the iron was first weighed on the deck of the ship. The mate referred him to the agent of the vessel, who was not on board, to obtain permission, but the captain of the lighter refused to look up the agent. The vessel did not obtain a berth alongside the wharf until Saturday afternoon. The owners of the dock would not allow iron to be landed on their dock even for the purpose of weighing. Nothing more was done in behalf of the respondents, but, on Tuesday, pursuant to an understanding that they would receive the rails at Merchant's Stores, the bark proceeded there, where, on Wednesday, the rails were put upon the wharf, weighed, and taken away by the lighter.

If the libellant is entitled to recover any demurrage, it must be upon the theory that the respondents were under obligation either to receive the rails upon the lighter, under the circumstances of the case, or to select a suitable wharf for the purpose. Neither of these propositions can be maintained. By the terms of the bill of lading, the respondents became parties to all the conditions of the charter-party, except such as were supplanted or modified by the special conditions of the bill of lading. (*Davis v. Wallace*, 3 *Cliff.*, 130; *Smith v. Sieveking*, 4 *E. & B.*, 945; *Wegener v. Smith*, 33 *L. J.*, *C.*

P., 25.) But they were under no obligation to accept a delivery of their part of the cargo upon a lighter, in the absence of proof of any usage of the port authorizing such a delivery by the carrier. The conditions of the charter-party providing for delivering the cargo alongside the vessel at the consignee's risk and expense, and for the payment of lighterage, were undoubtedly intended for the protection of the carrier, and to relieve him from responsibility or expense in protecting or warehousing the cargo, in case the consignees should neglect to receive it after proper notice. Other than this, they imposed no exceptional liability upon the respondents. The charter-party and the bill of lading together imported an obligation on the part of the consignees to accept their part of the cargo at any suitable place of delivery, without delay, as soon as the condition of the ship in reference to the rest of the cargo would permit their part to be delivered. They were not obliged to take the rails until they could be delivered by the ship, and then they were bound to take them without delay.

The place of delivery seems to have been selected by the master or by the ship's agent. It was not a suitable place, because the owners of the Atlantic Docks did not permit rails to be landed on their dock, and would not allow these rails to be landed there. The respondents, as owners of a part only of the cargo, had no right to control the selection of the place of delivery. They had stipulated to accept their rails at the place where the rest of the cargo should be delivered. The charterers did not assume to select the place of delivery, nor did the other consignees. The case is like one where a general ship undertakes a delivery to several consignees, of their respective parts of the cargo. It is doubtful, in such a case, whether the consignees jointly have any right to select the place of delivery. In *The E. H. Fittler*, (1 *Lowell*, 114,) it was held, that they have such a right when they are unanimous; but the question was decided upon the usage of the port. Where there are several consignees, the master cannot conveniently consult them, and, certainly, unless they

unite in the selection of the place of delivery, his duty is satisfied by a delivery at a place suitable and reasonably convenient for all, under the special circumstances. His contract is fulfilled by delivery from the ship at a proper place within the port. If he does not deliver to the consignees personally, he must justify his substituted delivery by showing that it was in accordance with the terms of his contract, or with the usage of the port, or with the course of business between the parties. (*Gatliffe v. Bourne*, 4 Bing. N. C., 314, and 3 M. & G., 643, and 7 Id., 850; *Humphreys v. Reed*, 6 Whart., 435; *Hemphill v. Chenie*, 6 Watts & S., 62; *Ostrander v. Brown*, 15 Johns., 39.)

The respondents are not liable because they failed to select a place to receive their cargo, when they had no power of selection. The libellant was not obliged to await their action. He cannot hold them responsible for a delay which would not have injured him, and would not have occurred if he had performed his own duty. They undertook that there should be no delay in the delivery of the cargo on their part, but they did not undertake to assume liability for his delay, or for his failure to offer a suitable delivery to them. If the respondents had assumed to direct a delivery upon the lighter, or had promised unqualifiedly to provide a lighter for the reception of their rails, a foundation for the claim for demurrage would be established. But they stated to the vessel's agent that they would send a lighter if they could get a permit. It is true, the captain of the lighter informed the libellant that he would be ready to receive the rails when the ship was ready to discharge them, but, when that time came, he informed the mate, who was then in charge of the vessel, that he could not get permission of the customs authorities to take them, unless they could be weighed on the deck of the vessel. No delay ensued in consequence of his promise to take them. As it was understood, from the outset, that acceptance of delivery upon the lighter was conditional upon the consent of the customs authorities, it was incumbent upon the libellant to consent, when requested, or to treat the negotiations as

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ended and select his own place of delivery. The respondents held out no inducements for further delay, and, in the absence of any circumstances relieving the libellant from the duty of procuring a suitable place to discharge the rails, or showing his inability to do so, he has no reason to complain of the delay.

The decree of the District Court is affirmed, with costs.

WILLIAM GRONSTADT *vs.* CHARLES WITTHOFF AND OTHERS.

A bill of lading, after providing for demurrage for delay in unloading from a vessel empty petroleum barrels, said, "all other conditions as per charter-party." The charter-party provided that the cargo might consist of such barrels and of iron rails, and that the former should be discharged in the same berth with the rails. The barrels were above the rails. The vessel proceeded to a dock where the rails would be received, but where the dock owner refused to receive the barrels. Their consignee delayed for four days to provide a lighter to take them, after having agreed to do so:

Held,

- (1.) The provision as to unloading the barrels was made a part of the bill of lading;
- (2.) The detention was caused by the fault of the consignee.

(Before WALLACE, J., Southern District of New York, July 30th, 1884.)

THIS was a libel *in personam*, in Admiralty, filed in the District Court. After a decree for the respondents, (15 *Fed. Rep.*, 265,) the libellant appealed to this Court.

Franklin A. Wilcox, for the libellant.

Edward S. Hubbe, for the respondents.

WALLACE, J. The libellant, as master of the ship *Petropolis*, sues the consignees of part of her cargo for demurrage.

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The general cargo was shipped at Pillau, under a charter-party between the vessel owners and one Nordt, which provided, among other things, that the cargo might consist of empty petroleum barrels and rails, to be carried to New York, and also provided, that the cargo should be discharged in the same berth where the rails should be discharged. The respondents' barrels were shipped under a bill of lading, which, among other things, provided that the barrels should be taken free from on board the vessel in four running days, with demurrage at £10 per day for longer detention, and contained a clause, "all other conditions as per charter-party."

The vessel arrived at the port of New York on May 21st, 1880, and, upon the request of the owner of the iron rails, which were the major part of the cargo, went to the Erie Basin, to discharge her cargo, and, not being able to reach the wharf, moored alongside another vessel. The barrels were above the rails. She remained practically in this position until the afternoon of May 31st, waiting to reach the wharf. The respondents, having been notified on May 25th of her arrival, obtained an order for the delivery of the barrels on May 26th, from the vessel's agent, and, being informed that the vessel was at the Erie Basin, said they would send a lighter. The wharf owners objected to receiving empty petroleum barrels on their wharf. On the 27th, the respondents notified the vessel's agent, if there was no lighter alongside the vessel, to put the barrels on the dock and give them notice. He replied, that he was willing to put the barrels on the dock, if the respondents would arrange with the dock owners to receive them there, and at the same time notified the respondents that he should hold them responsible for detention if they did not get the barrels out by the night of the 29th. Nothing more was done by the respondents until the morning of May 31st, when they sent a lighter, and the barrels were delivered on her. Four days were occupied in delivering to the lighter.

The bill of lading adopted all the conditions of the charter-party not inconsistent with its own terms. It has frequently

been held, that, when it is sought to charge a consignee, or endorsee of a bill of lading, with liability upon the conditions of a charter-party, there must be a plain reference to the charter-party in the bill of lading, and a plain indication of an intention to incorporate such conditions into the contract. (*Young v. Moeller*, 5 *E. & B.*, 755; *Chappel v. Comfort*, 40 *L. J.*, *C. P.*, 58; *Gray v. Carr*, *L. R.*, 6 *Q. B.*, 522; *Russell v. Niemann*, 43 *L. J.*, *C. P.*, 10.) Here, the language of the charter-party is unambiguous and explicit, and, it cannot be doubted, is sufficient to adopt the conditions of the charter-party into the bill of lading. (*Smith v. Sieveking*, 4 *E. & B.*, 945; *Wegener v. Smith*, 33 *L. J.*, *C. P.*, 25; *Davis v. Wallace*, 3 *Cliff.*, 130.) By thus adopting the terms of the charter-party not inconsistent with those of the bill of lading, the consignees of the barrels agreed with the carrier that their part of the cargo might be delivered at the same place where the iron rails should be delivered.

In the absence of such a stipulation, it is probable that the charterer would have had the right to select the place of delivery, but it is clear that the respondents could not have exercised that right without the concurrence of the owners of the rest of the cargo, and that the master's duty toward them would be fulfilled if he selected a suitable and convenient place for the delivery of the whole cargo.

Under the present contract, however, it seems reasonable to conclude, that it was the intention of the parties that the master should consult the convenience of the consignees of the rails, in the selection of the place of delivery. This is suggested not only by the language of the contract, but by the situation of the parties, and their relation to the cargo and to each other. The cargo was to be delivered at a port where it is well known there are serious difficulties in landing either iron or petroleum barrels in the usual places for landing general cargoes. Many wharf owners object to receiving iron upon their wharves, on account of its weight, and the danger consequent thereon, and many more object to receiving empty petroleum barrels, because of their combustible character.

And this construction of the meaning of the contract is enforced by that placed upon it by the parties themselves, all of whom seemed to concede that the master had properly proceeded to the place where he did proceed, and that, under the circumstances, it was the duty of the respondents to provide a lighter to receive their barrels. If an instrument is ambiguous, and both parties have acted upon a particular construction of it, that construction, if in itself admissible, will be adopted by the Court. (*Chicago v. Sheldon*, 9 Wall., 50, 54; *Jackson v. Perrine*, 6 Vroom, 137; *Stone v. Clark*, 1 Met., 378; *Forbes v. Watt, L. R.*, 2 Sc. & Div. App., 214.)

The libellant followed the instructions of the consignees of the iron, and proceeded to a place of discharge, within the port, where the iron could be delivered on the dock, but where the dock owners would not permit the petroleum barrels to be landed. No objection was made by the respondents, when it was suggested that they should provide a lighter; and they undertook to obtain one. They knew that the iron could not be discharged until their barrels were removed. In consequence of their delay, the lay days expired.

It must be held, that the libellant was not in fault because, in selecting a place for the delivery of the cargo, in conformity with the contract of the parties, he selected one which was not altogether convenient for the respondents; that the lay days began to run after the ship reached the place of discharge to which she was directed by the consignees of the rails; and that the detention of the ship was caused by the respondents' delay.

A decree for four days' demurrage, at £10 per day, is directed, with costs to the libellant, in the District Court, and the costs of this appeal.

DANA ESTES AND OTHERS

vs.

JOHN D. WILLIAMS AND OTHERS. IN EQUITY.

One J., of England, published a series of books called the Chatterbox, and assigned to W. the exclusive right to use that name in the United States, for ten years. E. afterwards published a series of books by that name, so similar in appearance and style as to lead purchasers to think they were the books of J. *Held:*

- (1.) The rights of J. were violated, although there were publications by the same name, earlier than those by J.;
- (2.) The rights of J. were assignable to E.

(Before WHEELER, J., Southern District of New York, July 31st, 1884.)

WHEELER, J. Mr. James Johnston, of London, England, appears to have published a regular series of juvenile books of uniform appearance, and in a style of peculiar attractiveness, and called them the Chatterbox, until they have become widely known and quite popular, by that name, in that country and this. He assigned the exclusive right to use and protect that name in this country, to the orators, for ten years from January 1st, 1880. The defendants have, since that time, commenced the publication of a series of books, and called them by that name, and made them so similar in appearance and style to those of Johnston as to lead purchasers to think they are the same. As a matter of fact, it is found that they intended to make the books appear to be the same, and to avail themselves of the popularity which the books had attained by the labor and skill bestowed upon them by, and at the expense of, Johnston. There being no copyright to prevent, the defendants claim the right to so print and publish the series of books in this country, and that, if they have not the right, the orators have no right to prevent them.

There is no question but that the defendants have the right to reprint the compositions and illustrations contained

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in these books, including the titles of the several pieces and pictures. (*Jollie v. Jaques*, 1 *Blatchf. C. C. R.*; 618.) That does not settle the question as to the right claimed here. There is work in these publications aside from the ideas and conceptions. Johnston was not the writer of the articles, nor the designer of the pictures, composing the books, but he brought them out in this form. The name indicates this work. The defendants, by putting this name to their work, in bringing out the same style of book, indicate that their work is his. This renders his work less remunerative, and, while continued, is a continuing injury, which it is the peculiar province of a Court of equity to prevent. These principles are discussed, settled and applied in *McLean v. Fleming*, (96 *U. S.*, 245.)

It has been argued, that there have been various publications, from earlier times, by the same name, so that no new right to the use of that name could be acquired. This would be true, doubtless, as to all such publications as those to which the name was applied, but not as to those essentially different. The fact of these other publications bears only upon the questions of fact as to whether Johnston's work had come to be known by this name, and whether the defendants, by using the name, represent that their work is the same. The conclusion stated as to the fact has been reached after consideration of what is shown as to these other publications.

Johnston had the exclusive right to put his own work, as his own, upon the markets of the world. No one else had the right to represent that that other work was his. Not the right to prevent the copying of his, and putting the work upon the markets, but the right to be free from untrue representations that this other work was his, when put upon the markets. This gives him nothing but the fair enjoyment of the just reputation of his own work, which fully belongs to him. It deprives others of nothing that belongs to them.

The question then arises, whether Johnston could transfer his right, or any part of it, to the orators, so that the defendants, in what they have done and are about to do, trespass up-

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on the orators' rights, and not upon Johnston's. He could not do all this himself; he must act by and through others. No reason is apparent why he could not give them the exclusive right to put his work on the market as his, as he had that right. This seems to be what he undertook to do. They had that right, and the profits of its enjoyment would belong to them. The defendants would deprive them, and not Johnston, of the profits. The injury would be to them, and not to him, and they are, in this view, entitled to the remedy.

It is objected, that they also trespassed upon Johnston's rights, before they acquired them. This may be true; and, if so, they may be liable for the damages. Such a trespass would not prevent them from acquiring a lawful right in a lawful manner. Had such trespasses been so frequent and long continued that the work had come to be known to be the work of others, or had lost identification as the work of Johnston, the course of the defendants might not amount to any representations that their work was his; but the evidence does not show this. As the case is now understood, the orators appear to be entitled to relief.

Let there be a decree for an injunction and an account.

J. L. S. Roberts, for the plaintiffs:

Walter M. Rosebault and *Roger Foster*, for the defendants.

The Celluloid Manufacturing Company v. Pratt, Read and Company.

THE CELLULOID MANUFACTURING COMPANY AND THE PIANO
KEY MANUFACTURING COMPANY

vs.

PRATT, READ AND COMPANY. IN EQUITY.

THE SAME

vs.

COMSTOCK, CHENEY AND COMPANY. IN EQUITY.

Claim 1 of letters patent No. 210,780, granted, December 10th, 1878, to the Celluloid Manufacturing Company, assignee of John W. Hyatt, for an improvement in the manufacture of piano keys, namely, "1. As a new article of manufacture, a blank key-board covered with a continuous strip or roll of plastic composition, substantially as specified," is a valid claim.

The invention consisted in covering the entire upper surface of the key-board with a sheet of celluloid, fastened to the wood with the usual celluloid cement, and was patentable.

It is an infringement of claim 1 to cover a substantial portion of the upper surface of the key-board with a single sheet of celluloid, but it is not an infringement to cover single keys with separate strips of celluloid.

(Before SHIPMAN, J., Connecticut, July 31st, 1884.)

SHIPMAN, J. These are two bills in equity, each charging the respective defendants with the infringement of letters patent No. 210,780, dated December 10th, 1878, to the Celluloid Manufacturing Company, assignee of John W. Hyatt, for an improvement in the manufacture of piano keys.

At the date of the patented invention, piano keys and organ keys were always covered with ivory. The "head" of the key is that portion which is in front of the sharps or black keys, and the "tail" is that portion which extends backward between the sharps. The "front" of the key is the portion

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which is below the head. After the blank wooden key-board was made, and the spaces which the keys were to occupy had been properly designated, the next step was to cover the fronts with strips of ivory. Before 1860, white holly wood was used for the fronts. When ivory was used, the fronts were made by gluing strips large enough to cover the fronts of two keys, or the front of one key, and, sometimes, as in Steinway & Sons' factory, the entire front of the board was covered with a single strip. Each head was then separately glued on, and each separate tail was thereafter joined to each head, and the board was then sawed into the separate keys. The top of the right hand key was frequently covered with one strip. The public taste requires that the fronts should match each other, and that heads and tails should also be of the same grain and color, and that the entire top surface of the white keys should also be matched.

While the method of construction which has been described was the one in general use, the whole of each key, head, front and tail, had been made of a single piece of ivory, under the Needham patent. The entire upper surface of each of two key-boards was once covered, in the factory of Steinway & Sons, of New York, with a single sheet of ivory, but this was an exceptional feat, performed with an exceptionally beautiful and evenly grained piece of ivory. All the heads of the keys upon a key-board have also been covered with a single strip of ivory. Seventy-five key-boards were made in this way by Pratt, Read & Co., of Meriden. This experiment was not repeated by that firm.

The objection to covering a large space with a single strip are, that the ivory is apt to "check," or have small cracks, and that, being non-plastic, it does not uniformly adhere to the wood; and, also, that the grain is not uniform, and, therefore, heads and tails do not match each other. The covering of a large surface with ivory was not unknown, it had been done in exceptional instances, but it was not practicable to make keys in this way, and the only practical and commercial

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method of manufacture was by gluing separate strips to the upper surface of separate keys.

After the invention of the article to which the trade name of celluloid was given, Mr. Hyatt endeavored to make celluloid keys in the same manner in which ivory keys had been made, but was unsuccessful. He then succeeded in covering the entire upper surface of a key-board with a sheet of celluloid, fastened to the wood with the usual celluloid cement. This method of construction was economical of time, and has reduced the price of the cheaper grades of keys.

The invention did not consist in the substitution of celluloid for ivory, whereby a reduction in the price of keys was caused, but it consisted in the fact, that, by the use of celluloid, there was practically furnished a new and useful mode of constructing key-boards, viz., by cementing to the board a single sheet of the veneer, instead of by gluing a large number of separate pieces of ivory, which must each be matched and separately fastened to the wood. This new method of construction was impracticable with ivory, or with any material which was known before celluloid was manufactured; and it required invention to find out and demonstrate that key-boards could be manufactured, so as to be a commercial article, by covering their upper surfaces with a single sheet of a material which would make an attractive and permanent coating for the wooden keys, because, from the fact that celluloid existed, it by no means followed that a key-board could be efficiently and successfully covered with it. The defendants do not deny the patentability of the invention, but place their case upon non-infringement, as they construe the patent.

The patentee describes his invention, in the descriptive part of his patent, as follows: It "consists in covering a suitable key-board blank, on its exposed upper surface and edge, with a sheet or scroll of some plastic composition, which is cemented, or otherwise caused to adhere, to the surfaces whereon it is desired. After being thus coated, the blank is

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sawed, or otherwise severed, into sections, each one of which constitutes a covered key. * * * * In the accompanying drawings, A represents a key-board blank, composed of wood, or any other suitable material, of the size and contour required to form the number of keys of the dimensions required. Over the upper surface and outer edge of this blank, and cemented or otherwise secured thereto in a suitable manner, is provided a thin sheet or scroll, B, of plastic composition. So far as known, the material termed 'celluloid' is the best adapted to the purpose of covering the blank, though it is plain that other materials of a plastic nature may answer. The covering of the blank with the sheet of composition or material completes the first essential step toward the production of the invention. The next operation is to sever the blank into sections of the desired size, to form the keys, D."

The claims of the patent are the following: "1. As a new article of manufacture, a blank key-board covered with a continuous strip or roll of plastic composition, substantially as specified. 2. The within described process of forming piano or analogous keys, which consists in covering a key-board blank with a strip of plastic material, and then cutting out each key from the coated blank, substantially as specified."

The specification and the first claim, if it is construed literally, describe a broader invention than Hyatt made. His invention did not consist in covering a key-board with any plastic composition, because he knew nothing of the adaptability for the purpose of any other material than the one which has the general name of celluloid, neither did he know how any other material could be cemented or fastened to the wood. His invention was confined to the materials upon which he successfully experimented, and his patent is to be limited to plastic composition of the nature and character of celluloid, and cemented to the wood with the cement with which celluloid is usually caused to adhere to another surface.

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Each defendant is a manufacturer of piano and organ keys, and covers the upper surfaces and edges of some of its key-boards, each with a sheet of chrolithion or celluloid, and also covers the fronts of the same key-boards, each with another strip of the same material. They insist that this is not an infringement of the plaintiffs' patent, which they construe to be for a covering the upper surface and the front of a key-board with one sheet of celluloid. The patent speaks of covering the "upper surface and outer edge" of the blank, but it is manifest, from the drawings, that the outer edge does not mean the front, but the edge of the top, of the key-board. The defendants do not always cover the whole of the top with a single sheet of celluloid, but sometimes use two sheets. It is an infringement, if a substantial portion of the upper surface of the key-board is covered with a single sheet, but it is not an infringement to cover single keys with separate strips of celluloid.

The second claim of the patent seems to have been inserted for the mere purpose of having more than one claim. As a statement of the invention, which consisted in covering the upper surface of a key-board with a single sheet of celluloid, it is useless; and, as a statement of the process of making key-boards, it is incorrect. It is far preferable to cement an unpolished than a polished sheet to the key-board, as the inventor well knew, and, therefore, the next operation, after cementing the sheet, is to level and polish it. The defendants do not use the process which is described in this claim.

Let there be a decree for an injunction against the infringement of the first claim, and for an accounting.

J. E. Hindon Hyde and *Frederic H. Betts*, for the plaintiffs.

George B. Ashley and *Francis C. Nye*, for the defendants.

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THE PHENIX INSURANCE COMPANY

vs.

THE LIVERPOOL AND GREAT WESTERN STEAMSHIP COMPANY,
(LIMITED.)

THE INSURANCE COMPANY OF NORTH AMERICA

vs.

THE SAME.

The master of a British steamer which, on a voyage from New York to Liverpool, was stranded on the coast of Wales, held to have been negligent, in that he had reasonable ground to believe that he had been mistaken all along as to the position of his ship, because he had taken no cross bearings of a light which he saw, expecting to see it near at hand and in a certain direction, but seeing it in a different direction, and thinking he saw it at a great distance, and had not, on losing sight of that light, seen another light which ought to have been then seen, and had heard a fog-gun in a direction which indicated that the ship was in a dangerous position.

A through bill of lading of goods on board of the steamer, from Nashville, Tennessee, to Liverpool, England, for their transportation by specified railroads to New York, and thence by the steamship line to which the steamer belonged, provided, that that company alone should be answerable for loss, in whose actual custody the goods were at the happening of the loss, and that "the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods:" *Held*, that, as, in the bill of lading, the terms and conditions of the transportation to New York by the railroads were separate and distinct from those of the ocean transportation, and the agent who signed the bill of lading signed as "agent severally, but not jointly," and the terms and conditions of the ocean carriage contained no clause as to the benefit of insurance, and the bills of lading issued by the steamer not in connection with railroad transportation did not contain any such clause, the carrier could not have the benefit of such insurance clause, as against an insurance company which, having insured goods lost by the stranding, had paid the loss, and then sued the carrier for the amount, on the ground of the negligence above set forth

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That part of the through bill of lading which related to the ocean transportation excepted loss from accidents of the seas, occurring by the negligence of the master, mariners or servants of the ship-owners: *Held*,

- (1.) The owners of the vessel were common carriers of cargo;
- (2.) They could not lawfully contract for exemption from liability for the negligence of their agents in charge of the navigation of the vessel;
- (3.) As the answers admitted the jurisdiction of the District Court, and did not set up that the law of Great Britain applied to the case, and that law, if different from that of the forum, was not proved as a fact, and there was no contracting in view of any other law than the recognized law of the forum, the case must be decided according to the law of the Federal Courts, as a question of general commercial law;
- (4.) The libellant, having paid the loss, was subrogated to the rights of the insured, and could maintain this suit to recover the sum so paid.

A motion by the respondent, in the Circuit Court, to amend the answer, so as to set up, as a ground of defence, the law of Great Britain, enabling ship-owners to exempt themselves, by express contract, from liability for loss of goods carried by their ships, arising from negligence, was denied, on the ground that, under Rules 3 and 4 of the Circuit Court, the written appeal had not stated that it was intended, on the appeal, to make new allegations.

(Before BLATCHFORD, J., Eastern District of New York, July 31st, 1884, and August 21st, 1884.)

THESE were libels *in personam*, in Admiralty, filed in the District Court. After a decree for the libellants, (17 *Fed. Rep.*, 377,) the respondent appealed to this Court, which found the following facts, in the case of the Phenix Insurance Company: "The respondent, the Liverpool and Great Western Steamship Company, (limited,) is a corporation organized under the laws of Great Britain, and, in the month of March, 1880, and for a long time prior thereto, was the owner of the steamer Montana. [The libellant, the Phenix Insurance Company, has been for many years, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of New York, for transacting the business of insurance, including marine risks. During said time it had an agency in Liverpool, England, for the adjustment and settlement of losses, and the losses referred to herein were adjusted by such agency, and were paid by it in Liverpool.] The Montana was an ocean steamer, built of iron, and performed regular service

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as a common carrier of merchandise and passengers between the ports of Liverpool, England, and New York, in the line commonly known as the Guion Line. By her and by other ships in that line the respondent was such common carrier. On the 2d of March, 1880, the *Montana* left the port of New York, on one of her regular voyages, bound for Liverpool, England, with a full cargo, consisting of about twenty-four hundred tons of merchandise, and with passengers. She stopped at Queenstown in the afternoon of the 12th of March, and thence proceeded on her voyage. She passed Tuskar Rock, on the extreme southeastern portion of Ireland, at about eight o'clock in the evening of the 12th of March, and thence took a course up and across the Irish Channel. The course she took would ordinarily have carried her outside of the range of the South Arklow light, which is a light on the east coast of Ireland; but, with the wind, tides and currents as they were that night, she passed within range of that light, and about nine miles off, at 9.45 P. M. On passing the South Arklow light, the next light which those in charge of the navigation of the *Montana* expected to make was the South Stack light, on the coast of Wales, at the entrance of Holyhead Bay. The master of the *Montana* was on the bridge and in charge of her navigation. The lighthouse on South Stack carried two lights. One, the high light, was about 170 feet above high water. It was white in color, and exhibited in all directions at sea, with a range of from twenty to thirty miles, in clear weather. It was a revolving light, making one complete revolution in six minutes, and it showed a white flash light every minute. The other light was also white. It was about forty feet above high water, and was a semi-revolving light, exhibiting every minute and a half in all directions between east northeast and west by north. Its range in clear weather was from three to four miles, but it was regularly lit only in foggy or thick weather. Both of these lights were lit and burning all through the night of March 12th. A fog-bell was regularly sounded at South Stack, from ten o'clock in the night of March 12th until six o'clock in the morning of March

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13th. The bell weighed two and a quarter tons, and was operated upon by a hammer weighing about ninety-six pounds, which struck the bell on the outside, at intervals of fifteen seconds, and was worked by means of clockwork and a caloric engine. The sound was a powerful one, and its range was from three to four miles. The high light on the South Stack was established in 1809, and has ever since been regularly maintained. The fog-bell had been established for about twenty years, and has since then been regularly sounded in foggy weather. About east-northeast, magnetic, from South Stack, and distant about one mile therefrom, was a fog-gun station, known as North Stack. This fog-gun station had been established about twenty years, and, from midnight of March 12th until four o'clock in the morning of March 13th, the fog-gun was fired regularly every ten minutes. The gun was a twenty four pounder, and was each time charged with three pounds of powder, and a large junk wad, to give extra sound, the range of the sound being between five and six miles, when the fog was thick, with the wind, and about seven miles when the fog lifted. The fog-gun station, since it was established, has been regularly maintained, and the fog-gun fired regularly in foggy weather. About two miles east, magnetic, from North Stack, was the Holyhead Breakwater lighthouse. This lighthouse was at the outer end of Holyhead Breakwater, and it carried a fixed red light at a height of from sixty to seventy feet above high water, with flashes every seven and one-half seconds. The range of the light, in clear weather, was from three to four miles, and the range of the flash was about fourteen miles. The light was established in 1873, and has since then been regularly maintained. At the Breakwater lighthouse was a fog-bell, weighing about five hundred weight, which was operated upon by two hammers, worked by clockwork, and striking the bell on the outside, three times in quick succession, at intervals of fifteen seconds. The range of the sound was from a mile and a half to two miles. The bell was established in 1873, and was regularly rung in foggy weather. It was in operation from midnight of the 12th of March until

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five o'clock in the morning of the 13th of March. About five miles north-northeast, magnetic, from Holyhead Breakwater lighthouse, and across Holyhead Bay, was the Skerries lighthouse. The Skerries lighthouse was about northeast, magnetic, from South Stack lighthouse, and distant therefrom between seven and eight miles. It was situated on a small island about two miles off Carmel Head, and about two or three miles north-northwest, magnetic, from Church Bay. It carried a stationary white light, between eighty and ninety feet above low-water mark, exhibiting in all directions at sea, and in Holyhead Bay, with a range of about sixteen miles. It was burning all through the night of March 12th. It was established between seventy and eighty years ago, and has been regularly maintained since. There was, at Skerries lighthouse, a fog-horn or siren, worked by two powerful caloric engines, at a pressure of forty pounds to the square inch. The sound made was shrill and powerful, and had a range of eight miles in foggy weather, and the sound was regularly given from ten o'clock at night of March 12th until half-past four o'clock in the morning of March 13th, at intervals of three minutes. This fog-horn or siren had been established for several years, and it has been regularly maintained ever since. All through the night of March 12th, until five o'clock in the morning of March 13th, a fog overspread the land surrounding Holyhead Bay, and extended at times, and to some extent, into the bay and out to sea. The proper course of the *Montana* was to keep three or four miles off the land at the South Stack, and on a course about northeast by east, magnetic, until she had the Skerries abaft her beam, and then to take a course about east by south, magnetic, to Liverpool. There was a westerly variation of about two points between magnetic courses and true courses, in the Irish Channel and adjacent waters. The *Montana*, on a course about northeast by east, magnetic, passed within a short distance of South Stack lighthouse, and saw the high light there, between one and two o'clock in the morning of March 13th. It came into sight bearing about southeast by east, and one point for-

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ward of the starboard beam of the *Montana*. Her officers expected to see it at a distance of about twenty miles off, bearing from east-northeast to northeast by east. When they saw it first they thought it to be fifteen miles off and they remained of that opinion. It passed out of sight abaft their beam, they supposing it was hidden by the horizon. The master of the *Montana* did not ascertain by cross bearings, (which he might readily have made,) the distance at which he was from the light. He lost the light because it was shut out from him by a fog which intervened between it and the *Montana*, and thence he continued, with his engines working at full speed, and giving the *Montana* a speed through the water of about fourteen knots an hour, and on an east three-quarters south, magnetic, course, to which he had changed, which took him directly into Holyhead Bay, until after half-past two o'clock. Before this time a man had been stationed at the fog-whistle of the *Montana*, who regularly blew it. At about half-past two o'clock, the master of the *Montana* heard the fog gun on North Stack off his starboard quarter, abaft his starboard beam, and he thereupon changed the course of the steamer again to northeast by east, magnetic; but he continued his engines at full speed until 2.45 A. M., at which time the engines were put at half speed, which gave the steamer a speed through the water of between nine and ten knots per hour. Five minutes later the shore loomed up through the fog, on the starboard bow, and orders were given to slow and stop the engines and to put them full speed astern. But, before these latest orders could be executed, the *Montana* ran ashore at Clegyr Point, in Church Bay. After leaving Tuskar, and up to one o'clock in the morning of March 13th, the *Montana* was running with a flood tide. Then there was slack water, and she afterwards encountered an ebb tide, which ran from three to four knots an hour. At no time that night were any soundings taken on board of the *Montana*, though soundings would have indicated to her master that he was running rapidly on to the shore. The lights at Holyhead Breakwater and the Skerries were not seen by those in charge of the naviga-

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tion of the *Montana*, and her lookouts and those in charge of her navigation did not hear the fog-bell at South Stack, or that at Holyhead Breakwater, or the siren at the Skerries, and they did not hear the fog-gun at North Stack until it was on their quarter. When they lost sight of the South Stack light they were within range of the Skerries light, and ought to, and would, have seen it, unless it was shut out by a fog. The water outside of Holyhead Bay ranged from twenty to eighty fathoms in depth, while the water in Holyhead Bay ranged from five to seventeen fathoms in depth, regularly shoaling as the shore was approached. Almost immediately after the *Montana* ran ashore she commenced filling with water, and thereby her cargo was in large part destroyed or damaged. Portions of it were thereafter taken from the steamer and forwarded to Liverpool, and there delivered. The *Montana* was then floated and taken to Liverpool for repairs. Those in charge of the navigation of the *Montana* were negligent, in that, without having taken cross bearings of the light at South Stack, and so determined their distance from the light, they took an east three-quarters south course before passing the Skerries, and without seeing the Skerries light, and in that they continued at full speed after hearing the fog-gun at North Stack, and in that they took a northeast by east, magnetic, course on hearing said fog-gun, instead of stopping and backing and taking a westerly course out of Holyhead Bay, and in that they did not ascertain their position in Holyhead Bay by means of the lights and fog signals, or by the use of the lead, or by stopping until they should, by those means or otherwise, learn where their ship was. [Part of the cargo of the *Montana* consisted of three hundred bales of cotton, thirty-seven of which were marked H. G. M., sixty-seven of which were marked B. B., ninety-six of which were marked L. O. W., and one hundred of which were marked D. D., owned by Swanson, Porteous & Co., merchants, of the city of New York, and shipped on their account, by Ordway, Dudley & Maguire, merchants, of Nashville, Tennessee, under a through bill of lading, from Nashville, Tennessee, to Liverpool, En-

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gland, there to be delivered to their order, which bill of lading is Exhibit C to the consent signed by the proctors for the respondent herein, dated November 9th, 1882, contained in the apostles. At or about the time of shipment, the libellant issued its policy and certificate of insurance to Swanson, Porteous & Co., in the sum of \$20,000, payable to them or to their order, upon the said shipment of cotton, which sum was the value of said cotton, against all dangers and perils of the seas. Said policy of insurance, No. 4,031, is Exhibit A to said consent, and said certificate of insurance, No. 19,405, is Exhibit B to said consent. The said bales of cotton were shipped in good order, on board of the *Montana*, at New York, consigned by Swanson, Porteous & Co., through Swanson, Cairns & Co., who had duly become joint owners with Swanson, Porteous & Co., of the said bales of cotton, and of the insurance thereon, to John Rew & Co., of Liverpool, brokers, who acted as agents of Swanson, Porteous & Co., and of Swanson, Cairns & Co., in disposing of the cotton and settling the insurance. The said bales of cotton were damaged by the stranding of the *Montana*, and the general or particular average thereon having been duly adjusted, the libellant paid the assured, through John Rew & Co., in settlement thereof, the sum of £800, British sterling, on May 8th, 1880, and £350 on March 18th, 1881, and £301.14.9 on September 2d, 1881, and £27.9.10 on November 14th, 1882. Part of the cargo of the *Montana* consisted of one hundred and fifty bales of cotton, forty-five of which were marked H. E. N., forty-five of which were marked D. U. D., and sixty of which were marked H. E. L., and one hundred other bales of cotton, marked F. A. D., owned by Gilbert, Parkes & Co., merchants, of Nashville, Tennessee, and shipped by them, under through bills of lading, in February, 1880, from Nashville, Tennessee, to Liverpool, England, there to be delivered to their order, which bills of lading are Exhibits H and J to said consent. At or after the date of shipment, Gilbert, Parkes & Co., sold the said cotton, and transferred the said bills of lading, to Hobart, Smith & Co., merchants, of the city of New York, and thereafter the

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libellant issued to Hobart, Smith & Co., its policy and certificates of insurance, payable to them, or to their order, upon said one hundred and fifty bales of cotton, in the sum of \$9,900, and upon said one hundred bales of cotton, in the sum of \$6,700, which sums were the values of said respective shipments of cotton, against all dangers and perils of the seas. Said policy of insurance last named, No. 1,037, is Exhibit G to said consent, and said certificates of insurance last named are respectively Exhibits I and K to said consent. Said bales of cotton were shipped on board of the *Montana*, at New York, in good order and condition, on or about the 1st day of March, 1880. George Frazer, Son & Co., of Manchester, England, became joint owners with Hobart, Smith & Co., of said bales of cotton and the insurance thereon, before the stranding of the *Montana*, and the cotton was consigned to them in England, and the bills of lading and certificates of insurance were sent to them by Hobart, Smith & Co. The said bales of cotton were damaged by the stranding of the *Montana*, and, the general and particular average thereon having been duly adjusted, the libellant paid, in settlement thereof, to George Frazer, Son & Co., £1,000, British sterling, on December 6th, 1880, and £74.11.9 on September 12th, 1881, and £13.19.3 on November 14th, 1882, for which sums George Frazer, Son & Co., accounted to Hobart, Smith & Co. Part of the cargo of the *Montana* consisted of twenty-two boxes of bacon, and four tierces of hams, owned by Jessie Baxter, of the city of Brooklyn, State of New York, and shipped on her account, on board of the *Montana*, in good order and condition, on or about March 1st, 1880, by Archibald Baxter, agent, to be delivered at Liverpool, to his order, under a bill of lading which is Exhibit P to said consent. At or about the time of said shipment, the libellant issued its policy and certificate of insurance to said Archibald Baxter, agent, for account of said Jessie Baxter, payable to him or his order, upon the said boxes of bacon and tierces of ham, in the sum of \$1,100, which was the value of said bacon and hams, against all perils of the seas. Said policy of insurance last named, No. 4,156, is Exhibit O

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to said consent, and said certificate of insurance last named is Exhibit Q to said consent. The said bacon and hams were consigned to Marpels, Jones & Co., of Liverpool, for sale on said Jessie Baxter's account, and the bill of lading and certificate of insurance were sent forward to them with the consignment. By the stranding of the *Montana*, the said bacon and hams were damaged, and, upon the due adjustment of the general and particular average thereon, the libellant paid, in settlement thereof, to said Marpels, Jones & Co., the sum of £114.10.3, British sterling, on October 5th, 1880, and the sum of £37.2.4 on September 23d, 1881, and the sum of £0.15.1 on November 14th, 1882, for which sums Marpels, Jones & Co., duly accounted to said Jessie Baxter.]”

On the foregoing facts, the Circuit Court found the following conclusions of law, in the case of the Phenix Insurance Company: “The stranding of the *Montana*, and the consequent damage to her cargo, having been the direct result of the negligence of the master and officers of the steamer, the respondent is liable therefor. The libellant was duly subrogated to the rights of the insured against the carrier, for the damage to the cargo insured by the libellant, and is, therefore, entitled to recover from the respondent the amount of such damage. [The libellant is entitled to a decree against the respondent for the following sums, according to the report of the Commissioner, contained in the apostles: For \$7,198.66 on account of the cotton shipped by Ordway, Dudley & Maguire, with interest thereon from September 20th, 1880; for \$5,297.42 on account of the cotton shipped by Gilbert, Parkes & Co., with interest thereon from December 24th, 1880; for \$741.56 on account of the bacon and hams shipped by Archibald Baxter, agent, with interest thereon from December 24th, 1880; and for its costs in the District Court, taxed at the sum of \$211.68; and for its costs in this Court, to be taxed.]”

In the case of the Insurance Company of North America, this Court found the same facts as in the case of the Phenix Insurance Company, except as to those enclosed in brackets, and in lieu of those found the following facts: “The libel-

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lant, the Insurance Company of North America, has been for many years, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, for transacting the business of insurance, including marine risks. During said time it had an agency in London, England, for the adjustment and settlement of losses, and the losses referred to herein, except the losses on the Logan & Preston shipment of grain, were adjusted by said agency and were paid through it, in London." "Part of the cargo of the Montana consisted of 16,190 $\frac{1}{2}$ bushels of wheat in bulk, and 251 $\frac{1}{2}$ bushels of wheat in bags, all of which had been shipped in good order and condition, on board of the Montana, on the 28th of February, 1880, by Logan & Preston, merchants, of the city of New York, to be delivered to their order, at Liverpool, England, under a bill of lading which is Exhibit C to the consent signed by the proctors for the respondent herein, dated November 8th, 1882, contained in the apostles. At or about the time of shipment, the libellant, on a policy of insurance issued by it to Logan & Preston, and their report thereon, insured the said Logan & Preston in the sum of \$27,500, upon the said wheat, which sum was the true value of the said wheat, against all dangers and perils of the sea. Said policy of insurance, No. 52,059, is Exhibit A to said consent, and said report is Exhibit B to said consent. The said wheat was in part lost, and the remainder thereof damaged, by the stranding of the Montana, and, on the 15th of March, 1880, Logan & Preston, who, at all times from the time of shipment and insurance, had been the owners of said wheat, abandoned the same to the libellant, which abandonment was accepted, and thereafter the libellant paid to Logan & Preston, on the 5th day of June, 1880, the sum of \$15,000 on account of said loss, and, on the 21st day of June, 1880, the sum of \$12,500, the balance of said loss. The libellant, after paying the necessary expenses of saving and marketing the wheat, received, as net proceeds of salvage thereof, the sum of £630, British sterling, on May 31st, 1880, and the further sum of £436.15.10 on July 30th, 1881. Part of the cargo of

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the *Montana* consisted of 245 boxes of meats, owned and shipped by Jacob Dold, a merchant of Buffalo, New York, under through bills of lading from Buffalo to Liverpool, England, there to be delivered to his order, which bills of lading are Exhibits H and I to said consent. The libellant insured said Jacob Dold, under a policy and certificate of insurance, which policy is Exhibit G to said consent, and which certificate, No. 31,024, is Exhibit J to said consent, said certificate being payable to the order of said Jacob Dold, upon the said boxes of meat, in the sum of \$9,500, which was their value, against all dangers and perils of the sea. The said meats were consigned by Jacob Dold to the firm of Watson, Dun & Co., of Liverpool, for sale, on his account and risk. He at the same time forwarded to Watson, Dun & Co., the said bills of lading and certificate of insurance. The said meats were shipped on board of the *Montana*, at New York, in good order and condition, and were in part damaged and in part totally lost by the stranding of the *Montana*, and a portion thereof was abandoned to the libellant, and the abandonment was accepted. The libellant thereafter paid to Watson, Dun & Co., on account of said loss and damage, as correctly adjusted, £1,250, British sterling, on the 18th of May, 1880, and the further sum of £227.4.8 on the 30th of June, 1880, for which sums Watson, Dun & Co., duly accounted to Jacob Dold. The libellant, after paying the necessary expenses of saving and marketing the meats abandoned to it, received, as net proceeds of salvage, on the 26th of May, 1880, the sum of £676.14.1, British sterling. Part of the cargo of the *Montana* consisted of 200 bales of cotton, shipped on board of the *Montana*, at New York, by Samuel B. Jones, general agent, on account of Alexander Burgess, a merchant of Nashville, Tennessee, who owned the cotton, to be transported to Liverpool and to be delivered there to order, under a bill of lading which is Exhibit N to said consent. At or before the time of shipment, the libellant, under its policy, No. 51,122, and its certificate, No. 21,141, issued to said Burgess, said certificate being payable to his order, said

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policy being Exhibit L to said consent, and said certificate, being Exhibit M to said consent, insured said Burgess on said 200 bales of cotton, in the sum of \$13,500, which was the value of said cotton, against all dangers and perils of the seas. The said Jones endorsed said bill of lading in blank, and delivered it to said Burgess, and said Burgess consigned the said bales of cotton to Brancker, Boxwell & Co., of Liverpool, England, for sale on his account and risk, and at the same time forwarded to them said bill of lading and certificate of insurance. The said bales of cotton were shipped on board of the Montana, at New York, in good order and condition, and were partly lost and partly damaged by the stranding of the Montana, and a portion of the consignment was abandoned to the libellant, and it accepted the abandonment, and paid to Brancker, Boxwell & Co., on account of the correctly adjusted loss of and damage to the said bales of cotton, the sum of £319.19.9, British sterling, on the 11th of June, 1880, and the further sum of £118.17.1 on the 12th of September, 1881, for which sums Brancker, Boxwell & Co., duly accounted to said Burgess. The libellant, after paying the necessary expenses of saving and marketing the bales of cotton abandoned to it, received, as net proceeds of salvage, the sum of £157.19.6, British sterling, on the 1st of September, 1880."

On the facts found in the case of the Insurance Company of North America, the Circuit Court found the same conclusions of law as in the case of the Phenix Insurance Company, except as to those enclosed in brackets, and, in lieu of those, found the following: "The libellant is entitled to a decree against the respondent for the following sums, according to the report of the Commissioner, contained in the apostles: On account of the wheat, the sum of \$27,500, with interest thereon from June 12th, 1880, less the sum of \$5,191.52 salvage, with interest thereon from September 1st, 1880; on account of the meat, the sum of \$3,895.77, with interest thereon from May 26th, 1880; on account of the cotton, the sum of \$3,313.39, with interest thereon from September 1st, 1880;

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and for its costs in the District Court, taxed at the sum of \$201.08; and for its costs in this Court, to be taxed."

William Allen Butler and *Thomas E. Stillman*, for the libellant.

Franklin A. Wilcox, for the claimants.

BLATCHFORD, J. The libels, in these cases, allege the shipment of the goods on the *Montana*, in good order, and the agreement of the respondent to deliver them in like good order, at Liverpool; that she was one of a line of steamers which the respondent ran between New York and Liverpool; that the respondent was a common carrier of passengers and cargo between those ports; that the respondent received the cargo and passengers of the *Montana*, on this voyage, as a common carrier; and that the respondent failed to deliver the goods as agreed, but they were lost or destroyed and damaged by the stranding of the *Montana*. The particulars of the voyage and stranding are set forth, and it is alleged that the stranding and loss were due to the negligence of those navigating the steamer, in proceeding at too high a rate of speed, in not having a sufficient lookout, in going upon an improper and dangerous course, in not making due allowance for the influence of the ebb tide, in not having or in not using, and properly using, the usual and proper outfit and appurtenances of an ocean steamer, and, among others, the lead and the compass, and in not so heeding the shore lights and signals as would have indicated to them her dangerous position, and would have enabled them to regain, and keep in, a position of safety. The libels allege insurance by the libellants on the goods to amounts equal to, or less than, their value, payment of, or liability for, moneys as and for the total loss or damage of the goods, damage equal to or greater than the amount of the insurance, and the subrogation of the libellants

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to the rights of the assured for the breaches of contract by the respondent.

The answers deny that the respondent was a common carrier. They set up, as defences, that the Montana was registered at Liverpool, which was her home port, where the respondent carried on its business, having an agency at New York; that the goods were received under bills of lading, which constituted the contracts; that the respondent assumed no greater risks than are expressed in the bills of lading; and that the loss or damage to the goods was by perils of the sea, and by causes in respect of which the respondent was exempt from liability by law and by the bills of lading. The answers set forth the particulars of the voyage and the stranding, and deny negligence, and allege that, in respect to the employment of a skilled and licensed master and officers, and the careful observation by them of the elements, and everything which would, in the exercise of ordinary human skill, enable them to determine and judge the position of the vessel, and to navigate her accordingly, and in respect to her seaworthiness and outfit, and everything within the reasonable limits of skill and foresight, the respondent complied with its contracts and with all the requirements of law.

The bill of lading, Exhibit C, in the first entitled case, is a through bill of lading, issued at Nashville, Tennessee, headed, "Overland and Ocean bill of lading, Louisville and Nashville and South and North Alabama Railroad, and the Williams and Guion Steamship Company, from Nashville, Tenn., to Liverpool, Eng." It covers 300 bales of cotton, stated to be "shipped in apparent good order," and "to be delivered in like good order and condition * * * under the following terms and conditions, viz.: That the said L. & N. & So. & No. Ala. Railroads and their connections which receive this property shall not be liable for * * * loss or damage on any article or property whatever by fire or other casualty while in transit, or while in deposit or places of transshipment, or at depots or landings at all points of delivery, nor for loss or damage by fire, collision, or the dangers of

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navigation while on seas, rivers, lakes or canals. * * * It is further agreed, that said L. & N. & So. & No. Ala. Railroads and their connections shall not be held accountable for any damage or deficiency in packages after the same shall have been receipted for in good order by consignees or their agents, at or by the next carrier beyond the point to which this bill of lading contracts. * * * It is further stipulated and agreed, that, in case of any loss, detriment or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods. And it is further agreed, that the amount of the loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of said goods or property at the place and time of shipment under this bill of lading. This contract is executed and accomplished, and the liability of the L. & N. & So. & No. Ala. Railroads and their connections, as common carriers thereunder, terminates on delivery of the goods or property to the steamship company at New York, when the liability of the steamship commences, and not before. And it is further agreed, that the property shall be transported from the port of New York to the port of Liverpool by the said steamship company, with liberty to ship by any other steamship or steamship line, subject to the following terms and conditions, viz.: To be delivered * * * in the like good order and condition at the aforesaid port of Liverpool, (the acts of God * * * barratry of master or mariners, * * * loss or damage resulting from * * * risk of craft * * * at sea in craft or on shore * * * or any other accidents of the seas, rivers and steam navigation, of whatever nature or kind soever, excepted, whether any one or more of all such exceptions arise, occur, or are in any way

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occasioned from or by the negligence, default or error in judgment of the master, mariners, engineers or others of the crew, or of any of the servants or employés of the ship-owners, or otherwise however;) * * * Notice. In accepting this bill of lading, the shipper or agent of the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions and conditions, whether written or printed." The bill of lading is dated at Nashville, Tennessee, February 4th, 1880, and is signed, "B. F. Champe, G. A., agent severally, but not jointly."

The bill of lading, Exhibit H, in the first entitled case, is like Exhibit C, except that it is for 150 bales of cotton, by other shippers, and is dated February 5th, 1880.

The bill of lading, Exhibit J, in the first entitled case, is like Exhibit H, except that it is for 100 bales of cotton, and is dated February 12th, 1880.

The bill of lading, Exhibit P, in the first entitled case, is dated at New York, March 1st, 1880, and covers 22 boxes of bacon and 4 tierces of hams, shipped in good order, and to be delivered in like good order and condition, at the port of Liverpool, "the act of God * * * barratry of master or mariners, * * * loss or damage resulting from * * * any of the following perils, (whether arising from the negligence, default, or error in judgment of the master, mariners, engineers or others of the crew, or otherwise howsoever,) excepted, namely, risk of craft * * * at sea in craft or on shore * * * or from the consequences of any damage or injury thereto, howsoever such damage or injury may be caused, * * * stranding, or other peril of the seas, rivers or navigation, of whatever nature or kind soever, and howsoever such * * * stranding, or other peril may be caused. * * * In accepting this bill of lading, the shipper or other agent of the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions and conditions, whether written or printed."

The bill of lading, Exhibit C, in the second entitled case, is like Exhibit P, in the first entitled case, except that it is for

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16,441 $\frac{3}{4}$ bushels of wheat, in bulk and bags, by other shippers, and is dated February 28th, 1880.

The bill of lading, Exhibit H, in the second entitled case, is a through bill of lading, issued at Buffalo, New York, headed, "Foreign bill of lading, S. S. Montana, New York Central and Hudson River Railroad Company, and the Guion Line Steamship Co., from Buffalo to Liverpool." It covers 100 boxes of middles, stated to be "shipped in apparent good order," and to be "subject to all the conditions expressed in the customary forms of bills of lading in use by said steamships or steamship company at time of shipment," and "to be delivered in like good order and condition * * * under the following terms and conditions, viz.: That the said New York Central and Hudson River Railroad Company, and its connections, which receive said property, shall not be liable * * * for loss or damage on any article of property whatever, by fire or other casualty while in transit, or while in deposit or places of transshipment, or at depots or landings at all points of delivery, nor for loss or damage by fire, collision, or the dangers of navigation, while on seas, rivers, lakes or canals. * * * It is further agreed, that said New York Central and Hudson River Railroad Company and its connections shall not be held accountable for any damage or deficiency in packages after the same shall have been receipted for in good order by consignees or their agents, at or by the next carrier beyond the point to which this bill of lading contracts. * * * It is further stipulated and agreed, that in case of any loss, detriment or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods. And it is further agreed, that the amount of loss or damage so

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accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of the said goods or property at the place and time of shipment under this bill of lading. This contract is executed and accomplished, and the liability of the New York Central and Hudson River Railroad Company, as common carriers thereunder, terminates, on the delivery of the goods or property to the steamship company at New York, when the liability of the steamship company commences, and not before. And it is further agreed, that the property shall be transported from the port of New York to the port of Liverpool by the said steamship company, with liberty to ship by any other steamship or steamship line, subject to the following terms and conditions, viz.: To be delivered * * * in the like good order and condition, at the aforesaid port of Liverpool, Eng., (the act of God * * * barratry of master or mariners, * * * loss or damage resulting from * * * risk of craft * * * at sea in craft or on shore * * * or any other accidents of the seas, rivers and steam navigation, of whatever nature or kind soever excepted, whether any one or more of all such exceptions arise, occur, or are in any way occasioned, from or by the negligence, default or error in judgment, of the master, mariners, engineers or others of the crew, or of any of the servants or employés of the ship-owners, or otherwise, however.) * * * Notice. In accepting this bill of lading, the shipper or the agent of the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions and conditions, whether written or printed." The bill of lading is dated at Buffalo, February 28th, 1880, and is signed, "S. Strandguard, agent severally, but not jointly," and also contains the words, "Buffalo, N. Y., to Liverpool, Eng., via New York."

The bill of lading, Exhibit I, in the second entitled case, is like Exhibit H, in the second entitled case, except that it is for 145 boxes of bellies, shoulders and middles.

The bill of lading, Exhibit N, in the second entitled

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case, is like Exhibit P, in the first entitled case, except that it is for 200 bales of cotton, and is dated March 2d, 1880.

The question of negligence in the *Montana* has been severely litigated, but, on the facts found, there is no room for doubt as to the proper conclusion. Those facts are set forth in the findings of fact, and establish the negligence. It is not necessary to discuss the evidence. That was done in the decision of the District Judge, and his views and conclusions are, in the main, satisfactory. Taking the account given by the master in his testimony, the District Judge was of opinion that it was untrue in important particulars; that it was not true that the ship ran only five minutes, and that at slow speed, on an east three-quarters south course; that, if the master did not note the length of time that he ran on that course, he was guilty of gross negligence; and that, if he did note the time, it was incumbent on him to state it truly, and he had not done so. The District Judge was also of opinion, that the ship, instead of passing the South Stack at a distance of fifteen miles, passed it close at hand; and that it was not true that the light changed its bearing to the master, in one hour, with the ship at full speed, on the course she was on, only two points. The District Judge also commented upon the facts, that the point marked by the master, on the chart, as that at which he lost the South Stack light, and changed his course to east three-quarters south, was a point where the Skerries light should have been in view, but was not, and yet it did not occur to him that that light and the South Stack light might be obscured by a fog; and that, although both the South Stack light and the Skerries light ought to have been seen by him at the same time, if he was where he supposed he was, he did not allow a doubt to arise, nor exercise the reasonable care of using the lead, when he changed his course to east three-quarters south; that the inability to see either of the two lights while on the latter course was indicative of a fog, even before the North Stack gun was heard; that the doubling of the lookouts and the blowing of the whistle indicated that a fog was thought of;

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that the testimony of the engineer, that the engine went at full speed until just as the ship struck, is contradictory of the statement of the master that he ran at half speed on the east three-quarters south course, and slow after changing back again; and that, to make this last change, after hearing the North Stack fog gun abaft his starboard beam, and knowing what it indicated, and to keep on the new course, was a gross mistake. The conclusion of the District Judge was, that, on the master's own showing, he failed to use reasonable care and skill in navigating his vessel, on hearing the North Stack gun; that such negligence caused the damage in question; and that it was not the result of a mere error of judgment.

In addition to the foregoing views, which are justified by the evidence, and involve the conclusion that the master, when he changed from his course from east three-quarters south, had reasonable ground to believe that he had been mistaken all along as to the position of his ship, and mistaken as to the distance of the South Stack light from him, during the time he saw it, it is to be remarked, that, in determining on the course to run, on changing from east three-quarters south, the master was bound not to ignore the fact that he had taken no cross bearings of the South Stack light. The failure to take such cross bearings might not alone be enough to convict the master of negligence, but the recollection of the fact that he had not taken such cross bearings, coupled with the recollection of the fact that he first saw the South Stack light in so unexpected a direction, and believed that he passed it at so unusual a distance, and with the failure to see the Skerries light on losing the South Stack light, and with the bearing of the North Stack fog gun abaft his starboard beam, stamp his action after hearing the gun as negligence and not error of judgment.

Stress is laid by the respondent on the provisions in the through bills of lading, that "the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods." But that provision applies only to the transportation to New York, and not to the

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ocean transit. The terms and conditions of the transportation to New York by the railroads and their connections are separate and distinct, in the through bills of lading, from the terms and conditions of the ocean transportation. The agent signs as "agent severally, but not jointly." The terms and conditions of the ocean carriage contain no clause as to the benefit of insurance. No such clause is found in the bills of lading dated at New York, not issued in connection with railroad transportation.

The clause as to non-liability for the negligence of the master or crew, or for any accident of the seas however happening, is common to all the bills of lading; and the respondent contends that under them it is not liable for the loss in these cases. The District Judge held that the respondent was a common carrier. The evidence shows that the steamers of the line carried to Liverpool grain, provisions and cotton, and brought back British products, iron, coal, salt and dry goods; that they also carried passengers; that the respondent advertised for cargo and passengers, and carried general cargo; that it refused to carry what would taint other cargo, or be dangerous to passengers, or would overload the vessel, but with those exceptions it took what cargo was offered if the rate of freight was satisfactory; and that the ships sailed on regular advertised days, and had been running since 1866, and had a regular pier in New York, and a regular landing place in Liverpool. If this does not make the respondent and its ships common carriers, nothing can do so. In 2 *Kent's Comm.*, 598, it is said: "Common carriers undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as to price. They consist of two distinct classes of men, viz., inland carriers by land or water, and carriers by sea." It is also there said, that, in the aggregate body are included "owners of ships, vessels and all water craft, including steam-vessels and steam tow-boats, belonging to internal as well as coasting and foreign navigation." In

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1 *Parsons on Maritime Law*, ch. 7, sec. 5, p. 173, it is said : " One who carries by water, in the same way and on the same terms as a common carrier by land, is also a common carrier ; or, in other words, it is not the *land* or the *water* which determines whether a carrier of goods is a common carrier, but other considerations, which are the same in both cases ;" and a common carrier is said, p. 174, to be " one who offers to carry goods for any person, between certain termini or on a certain route."

It is contended, for the respondent, that a carrier of goods by a vessel may lawfully contract for exemption from liability for the negligence of his agents in charge of the navigation of the vessel.

In *New Jersey Steam Navigation Co. v. Merchants' Bank*, (6 How., 344,) the Navigation Company, a carrier by water, by a steamboat, between New York and Providence, carried goods for one Harnden, under an agreement that he alone should be responsible for the loss or injury of any property committed to his care, and that no risk was assumed by or could be attached to the company, as proprietor of the steamboat. Harnden was an expressman, who carried on the steamboat, under that agreement, money, in specie, for the bank. The boat was burned through the negligence of the company in the equipment of the boat and the stowage of cargo, and the negligence of her officers on the voyage. The Court treated the company as liable as a carrier, and considered the question as to how far the special agreement had qualified its common law liability. The Court held, that while a carrier might limit his liability by a special agreement, expressly assented to by both parties, the agreement in that case could not be considered as stipulating for " wilful misconduct, gross negligence or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands ;" that the burden was on the bank to show such negligence or want of care ; that that was shown ; and that the company

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was liable for the loss, notwithstanding the special agreement.

In *Railroad Co. v. Lockwood*, (17 Wall., 357,) a drover was travelling on a railroad, on a stock train, to look after his cattle, on a free pass, under an agreement by which he assumed all risk of personal injury. He was injured while travelling on the stock train and sued the railroad company for damages. Negligence on its part was proved and found by the jury. The Supreme Court held that the case, on its facts, was one of carriage of the drover for hire. The distinct question raised, as stated by the Court, was, "whether a railroad company carrying passengers for hire can lawfully stipulate not to be answerable for their own, or their servants', negligence in reference to such carriage." The Court says, that a common carrier may, by special contract, limit his common law liability; that that was held in *New Jersey Steam Navigation Company v. Merchants' Bank*; and that the case of *Lockwood* seemed to be almost precisely within the category of the decision in *6 Howard*, the contracts in both cases being general, exempting the carrier from all risk, and the Court, in the case in *6 Howard*, having held that it would not be presumed that the parties intended to include the negligence of the carrier or his agents in such exemption. The Court, then, in the *Lockwood* case, proceeds to examine the question whether common carriers may excuse themselves from liability for negligence. It reviews the course of decisions in New York on the subject, and concludes that the Courts of New York had carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence. But it proceeds to examine the question as one of general commercial law, arising in a Federal Court administering justice in New York, and having equal and co-ordinate jurisdiction with the Courts of that State. It then discusses the cases on the subject in Pennsylvania, Ohio, Maine and Massachusetts, and cites those in other States, and English cases, and cases as to both passengers and goods in the Supreme

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Court. Among the cases as to goods were *York Company v. Central Railroad*, (3 Wall., 113,) and *Express Co. v. Kountze*, (8 Id., 342.) In view of all these cases, it holds, that a carrier having a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, is a common carrier; that a special contract about its responsibility does not divest it of that character; that it cannot be permitted to stipulate for immunity for the negligence of its servants; that the business of a carrier is a public one, and those who employ the carrier have no real freedom of choice, and the carrier cannot be allowed to impose conditions adverse to public policy and morality; that freedom from liability for losses through sheer accident, or dangers of navigation, which no human skill or vigilance can guard against, or for losses of money or valuable articles liable to be stolen or damaged, unless apprised of their character or value, or for like cases, is just and reasonable, and may be stipulated for, but that a public carrier cannot stipulate for exemptions which are unreasonable and improper, and which amount to an abdication of the essential duties of his employment; that a stipulation for exemption from liability for negligence is not just or reasonable; that a failure to exercise such care and diligence as are due from the carrier is negligence; and that the carrier remains liable for the negligence if the exemption stipulated for is unlawful. The Court then formulates its conclusions thus: 1. A common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law. 2. It is not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. 3. These rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter. 4. A drover travelling on a pass, such as was given in that case, for the purpose of taking care of his stock on the train, is a pas-

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senger for hire. Although the case of Lockwood was one of a passenger, and not of goods, the Court took pains to say that the rules it laid down were applicable to a carrier of goods. The reason assigned was, that the principles which demanded the existence of the rules in regard to passengers demanded that they should apply in regard to goods, though they applied with special force to passengers. Those principles were fully discussed in the opinion.

In *Express Co. v. Caldwell*, (21 Wall., 264,) it is stated to be the settled law, that the responsibility of a common carrier may be limited by an express agreement, if the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy, and the cases in 3 and 17 Wallace are cited as holding that such limitation cannot extend to losses by negligence or misconduct. This view is again asserted in *Railroad Co. v. Pratt*, (22 Wall., 123,) and in *Bank of Kentucky v. Adams Express Co.*, (93 U. S., 174.) These cases involved goods carried on land.

No legal distinction can be perceived between goods carried by a common carrier on land, and goods carried by one on the ocean, in respect to this question. It is urged, however, that the contract here was to be chiefly performed on board of a British vessel, and to be finally completed in Great Britain, and the damage occurred in Great Britain; and that the law of Great Britain, which is asserted to be different from the law here, is applicable to the case. As to this suggestion, it is sufficient to say, that the answers expressly admit the jurisdiction of the District Court, asserted in the libels; and that it is not set up, in the answers, that the law of Great Britain, or any other law than that of the forum, is applicable to the case, nor is the law of Great Britain, if it be different, proved as a fact. The case must be decided according to the law of the Federal Courts, as a question of general commercial law.

Aside from this, it may be said, that there was nothing in these contracts of affreightment to indicate any contracting in view of any other law than the recognized law of such forum

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in the United States as should have cognizance of suits on the contracts.

As the libellants paid the losses and damage resulting from the negligence for which the respondent was liable, they were subrogated to the rights of the insured and are entitled to maintain these suits to recover what they so paid. (*Hall v. Railroad Cos.*, 13 Wall., 367, 373; *The Monticello*, 17 How., 152.)

It is urged for the respondent, that, as the libellants insured these risks, and were paid for so doing, they should bear the loss; that, by the contract, the shipper was the insurer against the negligence, relieving the ship-owner of what would otherwise have been his risk, and re-insured the risk with the libellants; and that the agreement of the shipper to insure against the negligence gave him the insurable interest which he re-insured. The answer to this view is, that the libellants insured the goods against the risks specified in the policies, which risks covered the damage in question, and that they are entitled to the rights of the shippers under the contracts, and, as the exemption agreed on would be of no avail as a defence to suits by the shippers, it is of no avail against the libellants, in this forum.

The policy of the maritime law, to limit the liability of ship-owners, is invoked, and it is urged that they ought to be allowed to limit their liability, by contract. The liability of ship-owners is limited by statute. (*Rev. Stat. U. S.*, §§ 4,282 to 4,289,) and the extent to which such limitation is thus allowed may be considered as indicating the view of Congress as to how far legislation ought to prescribe exemption. It is said, in *Railroad Co. v. Lockwood*, (17 Wall., 361,) that these statutory provisions, as then enacted in the Act of March 3d, 1851, (9 *U. S. Stat. at Large*, 635,) leave the ship-owner liable, to the extent of his ship and freight, for the negligence and misconduct of his employés, and liable without limit for his own negligence. In § 1 of the Act of 1851, there was a proviso, that nothing in the Act contained should prevent the parties from making such contract as they pleased, extending or

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limiting the liability of ship-owners. As to that clause, it is said, in the same case, that that proviso neither enacts nor affirms anything, but simply expresses the intent of Congress to leave the right of contracting as it stood before the Act. But that proviso is not re-enacted in the Revised Statutes, and, as a portion of the section containing it is embraced in a section of the revision, the proviso is repealed by force of § 5,596.

The amounts due to the libellants were ascertained by competent and sufficient proofs, the exceptions of the respondent to such competency and sufficiency having been waived and stricken out.

There must be decrees for the libellants, with costs, for the amounts stated in the respective conclusions of law filed.*

Afterwards, the respondent made a motion, in the cases, for leave to amend the answers, which was denied August 21st, 1884.

Franklin A. Wilcox, for the motion.

Butler, Stillman & Hubbard, opposed.

BLATCHFORD, J. In the decision rendered by this Court, in these cases, (*ante*, p. 397,) it was said: "It is urged, however, that the contract here was to be chiefly performed on board of a British vessel, and to be finally completed in Great Britain, and the damage occurred in Great Britain; and that

* In the case of *The Ulster Marine Insurance Company, (Limited), v. The Liverpool and Great Western Steamship Company, (Limited)*, heard at the same time, the Court rendered the following decision: "As the amount of the recovery in the District Court, in this case, was too small to allow an appeal from this Court to the Supreme Court, and this case and the other two cases, in which the amounts decreed by this Court are each large enough for such an appeal, were tried together in the District Court, and have been heard together in this Court, on a single record, and the question of the liability of the respondent is the same in all of the cases, on the main point raised on the merits, it seems proper to suspend a decision of this case until an appeal to the Supreme Court, if promptly taken by the respondent, in either of the other two cases, shall be decided."

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the law of Great Britain, which is asserted to be different from the law here, is applicable to the case. As to this suggestion, it is sufficient to say, that the answers expressly admit the jurisdiction of the District Court, asserted in the libels; and that it is not set up, in the answers, that the law of Great Britain, or any other law than that of the forum, is applicable to the case, nor is the law of Great Britain, if it be different, proved as a fact. The case must be decided according to the law of the Federal Courts, as a question of general commercial law. Aside from this, it may be said, that there was nothing in these contracts of affreightment to indicate any contracting in view of any other law than the recognized law of such forum in the United States as should have cognizance of suits on the contracts." In the decision rendered by the District Judge, he remarked: "It is said, in behalf of the defendants, that their liability upon these bills of lading must be determined by the laws of England. But the undisputed facts show that there is no ground for such a contention."

The respondent now moves, in these cases, "for leave to amend the answers herein in the particulars mentioned and shown in the proposed amended answers hereto annexed, and for leave to prove the law of Great Britain, as therein prayed, and for such other and further relief as may be just." The motion is made before decrees are signed.

The allegations of the original answers, which are proposed to be amended, are these: "First. That the said The Liverpool and Great Western Steamship Company (Limited) has duly appeared herein. * * * Tenth. The respondent denies each and every allegation contained in the ninth article of the libel, except as herein admitted, and except that it admits the jurisdiction of this Honorable Court." The ninth article of the libel, in each case, was this: "Ninth. All and singular the premises are true, and within the Admiralty and maritime jurisdiction of this Honorable Court."

The answers, if amended as proposed, are to contain the following allegations, the parts not found in the original answers being underscored: "First. That the said The Liverpool

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and Great Western Steamship Company (Limited) has duly appeared herein, *but without prejudice to its right to rely upon the hereinafter mentioned law of Great Britain, as a ground of defence to the said libel.* * * * Tenth. The respondent denies each and every allegation contained in the ninth article of the libel, except as herein admitted, and except that it admits the jurisdiction of this Honorable Court, *without prejudice, however, to its right to rely upon the hereinafter mentioned law of Great Britain, as a ground of defence to the said libel.* * * * Fifteenth. The respondent, further answering, says, *that the said steamer, at the time of the said accident, was sailing under the flag of Great Britain.* Sixteenth. *That the law of Great Britain, at all the times mentioned in the said libel, enabled ship-owners, by express contract, to exempt themselves from liability for the consequences of any damages or injury to goods transported on their ships, howsoever the same might have been caused, whether arising from negligence, default, or error in judgment, of the master, mariners, engineers, or others of the crew, or otherwise.* Seventeenth. *That, by the contracts for the transportation or carriage of the goods claimed to have been lost or damaged by the libellant, the respondent had expressly, and in conformity with the said law, exempted itself from any liability whatsoever.* Eighteenth. *That the said contracts were subject to, and governed by, this said law."*

The affidavit of the proctor for the respondent, on which the motion is based, says, "that the respondent contends that the question of its liability is governed by, and should be decided under, the law of Great Britain; that, by the said law, the respondent would be exempt from liability to the libellants in these actions; that no proof of the said law has been made, it having been understood by the deponent that the same was recognized by the libellants, and formal proof thereof would not be required by them; that the question was argued, and reference and allusion made to the books of statutes, and reports of decisions, of Great Britain, without objections on the part of libellants, in the District Court; that the libel-

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lants, in their brief of argument before this Court, expressly admit that such is the law of Great Britain, in the following words, viz.: 'and in the English Courts, which uphold, to the fullest extent, the carrier's right to limit his liability, and which seem to recognize some special reason in favor of the privilege of exemption as applicable to the owners of vessels or steamships, as contradistinguished from land carriers;' that, nevertheless, the libellants made the point in this Court, and for the first time, that the proof had not been made; that the Court, in its said decision, has recognized this point, and held the same well taken; that great injustice may result to the respondent from this technicality, and it therefore prays that it may be permitted to amend its answers in the said actions, so that they will aver the existence of the said law, and its applicability to these actions; that grave questions and doubts exist as to the power of the Courts of the United States to decide the questions involved in these actions without a reference to the said law; that the issues to decide this question, under the view taken by this Court, are not properly raised by the answers of the respondent, it having appeared unreservedly and admitted therein the jurisdiction of the District Court; that jurisdiction was obtained by the District Court, in these cases, by process *in personam*, with clause of foreign attachment, under which property of the respondent was seized, and the respondent appeared in consequence thereof; and that it was not intended, by such appearance, or by the admission of the jurisdiction of the Court, to waive its right to rely upon the said law as a ground of defence. It, therefore, prays, that it also be permitted to amend its answers, so that they will qualify the appearance and admission of jurisdiction in this particular;" and "that it may be permitted to prove, in this Court, the said law of Great Britain, and for such other relief as may be just."

The libellants oppose this motion. Rule 24 of the Rules in Admiralty prescribed by the Supreme Court applies to and covers only amendments of informations and libels. Rule 51 of those Rules applies only to amending a libel. By Rule 46, the Circuit Court has power, in cases not provided for, to

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regulate its practice, in such manner as it shall deem most expedient for the due administration of justice in suits in Admiralty. Rule 52 contemplates that there shall be a "prayer for an appeal," in the District Court, and that such paper shall form a part of the record to be transmitted to the Circuit Court, on appeal.

This Court has promulgated Rules in regard to Appeals in Admiralty, as follows: "Rule 3. Every appeal to the Circuit Court, in a cause of Admiralty and maritime jurisdiction, shall be in writing, signed by the party, or his proctor, and delivered to the clerk of the District Court from the decree of which the appeal shall be made; and it shall be returned to the Court, with the necessary documents and proceedings, within twenty days, and by the first day of the next term after the delivering thereof to the clerk, unless a longer time is allowed by the Judge. Rule 4. The appeal shall briefly state the prayers, or allegations, of the parties to the suit, in the District Court, the proceedings in that Court, and the decree, with the time of rendering the same. It shall also state whether it is intended, on the appeal, to make new allegations, to pray different relief, or to seek a new decision on the facts, and the appellants shall be concluded in this behalf, by the appeal filed." The final decrees of the District Court, in these cases, were filed and entered February 19th, 1884. On the 29th of February, 1884, a notice of appeal by the respondent was filed in the District Court, in each case. On the 6th of May, 1884, a petition of appeal, in each case, was filed in the District Court. The petition complies with Rule 4 of this Court, and says: "and, on the said appeal, it intends to have the said cause heard anew on the pleadings and proofs in the District Court, and other proofs to be introduced in the said Circuit Court." The petitions of appeal do not state that the appellants intend to make new allegations, in this Court, on the appeals. They are, therefore, concluded, in that behalf, by the appeals filed.

The respondent having stated, in its answers, that it had duly appeared in each suit, cannot be permitted now to state

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that it made a qualified appearance. It does not appear that it made a qualified appearance, or other than an absolute appearance. The respondent having admitted, in its answers, the jurisdiction of the District Court, cannot be permitted to now change that admission to a qualified admission. The making of these allegations in the answers was not influenced by anything but the facts of the case as then before the respondent. There was no mistake or misapprehension of fact, and there is no suggestion that the respondent did not know then all it knows now in regard to the facts of the case. The allegations that the steamer was sailing under the British flag, and that the contracts purported to exempt the respondent from liability, and as to what the law of Great Britain was, are allegations of facts known to the respondent when the answers were filed. The allegation that the contracts were subject to, and governed by, the law of Great Britain, as an allegation of fact or law, does not set up anything newly discovered; and, if it is intended to set up a new defence, beyond any set up before, it is such a new allegation as Rule 4 of this Court, as to appeals, was intended to cut off, unless the petition of appeal should state an intention to make new allegations in this Court. That Rule is a reasonable one, and is calculated to promote the due administration of justice in suits in Admiralty.

The motion is denied.

Butler, Stillman & Hubbard, for the libellants.

F. A. Wilcox, for the respondent.

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FOTINI TIMAYENIS AND OTHERS

vs.

THE UNION MUTUAL LIFE INSURANCE COMPANY, OF MAINE,
AND DEMOSTHENES T. TIMAYENIS.

A policy of life insurance issued by a corporation of Massachusetts, recited an application by R., for insurance on the life of T., and the agreement of R. to pay annual premiums for 10 years, and insured the life of T., for \$5,000, for the benefit of his wife and their children, payable to them. It included a clause, that, after two or more annual premiums were paid, the policy was to be a paid-up one, of \$500 for each premium paid. R. afterwards surrendered the policy to the insurer, without the knowledge of the wife and children, and obtained a paid-up policy, on the life of T., payable to himself, for \$2,500. T. having died, R. furnished proofs of death, and was paid by the insurer the \$2,500. In a suit by the wife and children, against the insurer, to recover the amount due on the first policy: *Held*,

- (1.) R. did not act as the agent of the plaintiffs, in surrendering the first policy;
- (2.) Under the statute of Massachusetts, (*Gen. Stats.*, 1880, c. 58, § 62,) the policy enured to the benefit of the wife and children;
- (3.) Proof of death was waived by the insurer, by accepting from the plaintiffs, without objection, an affidavit of the death, referring to proofs on file with the insurer, made by R.;
- (4.) When R. surrendered the policy, the insurer held notes of his given for premiums, in lieu of money, which were afterwards paid by deducting their amounts from the money payable on the second policy. The notes not having been paid as applicable to premiums on the first policy, and thus only two annual premiums having been paid on that policy, the plaintiffs were allowed to recover \$1,000, with interest from 90 days after the service of such affidavit.

(Before WALLACE, J., Southern District of New York, August 1st, 1884.)

WALLACE, J. The plaintiffs are the widow of one Timayenis, now deceased, and her children by him, and they sue to recover the amount due upon a policy of insurance issued by the defendant, April 1st, 1869, upon the life of the husband. The defendant is a corporation of Massachusetts, and

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the policy was issued in that State, upon the application of one Rodocanachi, a brother of the widow.

The policy recites an application by Rodocanachi for insurance on the life of Timayenis, and the agreement of Rodocanachi to pay annual premiums for ten years. It is conditioned to insure the life of Timayenis, "for the sole and separate use and benefit of his wife, Fotini Timayenis, and their children, in the amount of \$5,000, * * * payable to the said assured, their executors, administrators or assigns, ninety days after due notice and proof of the death of the said insured, and the claim of the assured." The annual premium is \$370 25, and the policy provides, that, after two or more of the annual premiums are paid, the policy is to be a paid-up non-forfeitable one, in the sum of \$500, for each premium paid. Rodocanachi was the brother of Mrs. Timayenis, and procured the policy out of regard for her, gratuitously, and in order to secure her a provision in case of her husband's death. She resided in Smyrna at the time, and, upon obtaining the policy, he wrote to her enclosing a copy of it, telling her, in substance, that he had insured her husband's life as a resource for her, and that he had kept the original policy in order to collect the proceeds in case of her husband's death, and use them in his discretion for her benefit. After having made payment of four annual premiums, Rodocanachi surrendered the policy to the defendant, and subsequently obtained from the defendant a paid-up policy, for his own benefit, on the life of Timayenis, and payable to himself, for the sum of \$2,500. He had made these payments partly in cash, and partly by his own notes, which were outstanding at the time he surrendered the policy. This was done without consultation with Mrs. Timayenis, and was not known to her or to either of the plaintiffs until after the death of Mr. Timayenis. He died May 29th, 1882. Proofs of death were forwarded to the defendant by Rodocanachi, and the defendant paid to him the amount due on the new policy.

There is nothing in the case to indicate any bad faith on

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the part of Rodocanachi or of the defendant. The former supposed he had a right to control the policy and any fund that might accrue under it, and the defendant acted upon that assumption, and treated him as the insurer, and the party entitled to any insurance which might arise.

Upon these facts, it must be held, that the defendant entered into a contract with the plaintiffs for insurance upon the life of Timayenis, by the terms of which the defendant, upon the payment of two or more annual payments of premium, became obligated to pay the plaintiffs, upon the death of the insured, the sum of \$500 for each annual premium received by the defendant. It is quite immaterial that the defendant was induced to enter into this contract by Rodocanachi, the legal effect being the same whether he was the moving party, or whether the insured or the plaintiffs had been, instead of him. Neither is it material that the contract would have ceased to be obligatory upon the defendant if Rodocanachi had failed to continue paying the premiums. It suffices that they were paid, and that the defendant received the consideration stipulated for. Upon the receipt of the premiums, the obligation of the defendant to the plaintiffs, and the right of the plaintiffs to receive \$500 for each premium paid, became fastened.

The recitals in the policy show, plainly, that the defendant did not regard Rodocanachi as an agent of the plaintiffs or of the insured, to effect the insurance, but as a volunteer, who was representing himself only, and who had intervened in the transaction for the benefit of the plaintiffs. The defendant had, consequently, no right to regard him as an agent for the plaintiffs in surrendering the policy and entering into a new contract of insurance; and, in fact, the defendant did not deal with him upon such an assumption, but treated him as the principal, who had a right to surrender the policy because he had advanced the premiums.

The circumstance, that Rodocanachi retained the policy and intended to collect and apply the proceeds at his discretion, upon the death of the insured, may be laid out of view.

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The policy was merely the evidence of the contract which had been entered into between the parties; unimpeachable evidence of the terms of the contract, but nothing more. His intention to collect it and control the proceeds cannot alter the legal effect of the contract.

The case is no stronger for the defendant than it would be if Rodocanachi had paid the premiums in advance at the time the policy was issued, and had then refused to pay more; and, had this been the case, and had the plaintiffs remained ignorant of the whole transaction until the death of the insured, it is clear they could have sued upon the policy and recovered the amount paid up. Rodocanachi could not have compelled payment of the amount from the defendant, because the insurance was effected for the use and benefit of the plaintiffs, and the defendant's promise to pay, or obligation to perform, ran to them, and to them only. The plaintiffs could have done so although ignorant of the transaction at the time; because, the contract was made for their benefit, and they were named in it as the parties, and the only parties, interested in its performance. (*Austin v. Seligman*, 21 *Blatchf. C. C. R.*, 506; *Simson v. Brown*, 68 *N. Y.*, 355; *Hendrick v. Lindsay*, 93 *U. S.*, 143.)

Where the policy designates a person to whom the insurance money is to be paid, the person who procures the insurance, and who continues to pay the premiums, has no authority to change the designation or title of the money. (*Ricker v. Charter Oak Ins. Co.*, 27 *Minn.*, 195; *Pilcher v. N. Y. Ins. Co.*, 33 *La. Ann.*, 332.) He may be under no obligation to continue to pay the premiums, but, if he does, the person originally designated in the policy will derive the benefit; and any change of designation can only be made by his authority. (*Bliss on Life Ins.*, §§ 339 to 341, and cases there cited.)

By paying the premiums, Rodocanachi advanced the amount to the defendant in trust for the use of the beneficiaries, and the terms of the policy are the conditions of the trust. A gift to a third person for the use of the donee is

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valid, and can no more be revoked than a gift made directly to the donee. (*Wells v. Tucker*, 3 *Binney*, 366; *Coutant v. Schuyler*, 1 *Paige*, 316.) In the act of disposing of his own, the donor can attach such conditions and restrictions as he sees fit, but afterwards his power is gone. When the trust attaches, neither he nor the trustee can exercise any power over the subject-matter except conformably with the terms of the trust. (*Bispham's Eq.*, § 67.) The beneficiaries not having consented to the substitution of a new fund in place of that created by the original policy, the case stands, as to them, as if none had ever been made. (*Fortescue v. Barnett*, 2 *Mylne & Keen*, 36)

The contract was made in Massachusetts, and was to be performed there, and is, therefore, governed by the law of that State. The statutes of that State declare, that a policy expressed to be for the benefit of a married woman, whether procured by herself, her husband or any other person, shall inure to her separate use and benefit, and that of her children, independently of her husband or his creditors, or the person effecting the same or his creditors. (*Gen. Stats.*, 1860, c. 58, § 62.) It is stated by the Court, in *Gould v. Emerson*, (99 *Mass.*, 154, 156,) to have been the manifest purpose of the statute, among other objects, to restrain the person thus effecting insurance for the benefit of the wife and children of the insured, "from revoking, in a moment of caprice or embarrassment, the trust which he has once created upon a meritorious, and, by the statute, a sufficient consideration." If the case was not free from doubt upon general principles, it would be clearly so by force of the local law.

The policy provided for due notice and proof of the death of the insured before the termination of the policy, and of the just claim of the assured, or the executor, administrator, guardian or assigns of the assured. Soon after the death of the insured, one of his children notified the defendant of the death of his father, and was informed by the defendant that the claim was settled and paid to Rodocanachi. Shortly thereafter, one of the plaintiffs sent to the defendant an affi-

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davit, which stated the death of the insured, and the time and place of his death, and referred to the proof on file with the defendant, made by Rodocanachi, for further information, and which also stated the facts showing the right of the plaintiffs to claim the insurance. The defendant in reply stated, that it was still waiting for the proofs of death, but did not point out any reason for objecting to the proof furnished. As the proofs of the death of the insured already in possession of the defendant had been accepted by it as satisfactory, there is no merit in the contention of the defendant, that the plaintiffs have failed to comply with the terms of the policy in this respect. If the defendant had not already waived any proof of death, by claiming that it had paid the loss to the person entitled, (*Norwich & N. Y. Trans. Co. v. Western Mass. Ins. Co.*, 6 *Blatchf. C. C. R.*, 241; *Bennett v. Maryland Ins. Co.*, 14 *Id.*, 422; *Unthank v. Travellers' Ins. Co.*, 4 *Biss.*, 357; *Taylor v. Merchants' Fire Ins. Co.*, 9 *How.*, 390,) it did waive further proof than the affidavit, by failing to specify any grounds of objection to it in form or substance. (*Angell on Ins.*, §§ 242, 245.)

At the time Rodocanachi surrendered the policy to the defendant, the defendant had accepted his notes for \$566, in lieu of the money to that extent due from him for annual premiums. These notes were unpaid until after he surrendered the policy. When the defendant paid him the loss under the new policy issued to him, the defendant, by an arrangement with him, deducted the amount of the notes from the insurance moneys, and satisfied the notes. It would, undoubtedly, have been permissible, between him and the defendant, to have allowed the original policy to lapse. By its terms, it would have lapsed upon the non-payment of the notes. He was under no obligation to the plaintiffs to pay these notes, any more than he would have been if he had given them directly to the plaintiffs, (*Pearson v. Pearson*, 7 *Johns.*, 26; *Fink v. Cox*, 18 *Id.*, 145; *Holliday v. Atkinson*, 5 *Barn. & Cress.*, 501; *Parish v. Stone*, 14 *Pick.*, 198; *Holley v. Adams*, 16 *Vt.*, 206; *Raymond v. Sellick*, 10 *Conn.*,

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485,) because, a gift of one's own note is a gift of a promise merely; and, as the transaction, so far as the payments were concerned, was exclusively between the defendant and himself, the defendant was under no obligation to the plaintiffs to enforce the notes against him, any more than it was to receive them originally, instead of the money, for the premiums. If Rodocanachi had been acting as the agent of the plaintiffs, different considerations would arise. (*Dutton v. Willner*, 52 N. Y., 312.)

When he did pay the notes, he did not make payment of them, nor did the defendant accept payment of them, as applicable to the premiums upon the original policy. They were paid, and payment was accepted, in extinguishment of an independent claim existing in his favor against the defendant. So far as the plaintiffs are concerned, the case stands as though they had never been paid. Deducting the amount of the notes, only two annual premiums had been paid upon the policy in suit.

The plaintiffs are, therefore, entitled to recover \$1,000, with interest, which begins to run ninety days after October 16th, 1882, the date of the service of the affidavit of the proof of death, and the claim of the plaintiffs, upon the defendant.

Judgment is ordered accordingly.

Jefferson Clark, for the plaintiffs.

Merritt E. Sawyer, for the defendants.

The United States v. Colgate.

THE UNITED STATES vs. CLINTON G. COLGATE. IN EQUITY.

In a suit in equity, brought by the United States, by direction of the Attorney-General, to repeal a patent for an invention, an injunction will not be granted, *pendente lite*, to restrain the commencement, or prosecution, of suits for infringement.

(Before WHEELER, J., Southern District of New York, August 9th, 1884.)

WHEELER, J. This suit is brought by direction of the Attorney-General, to repeal letters patent granting exclusive rights to inventions, and has now been heard on a motion for a preliminary injunction to restrain the commencement, or prosecution, of suits for infringement. The patent has expired, and no injunction is asked against assignment of the patent. The right to maintain such a suit is placed upon the same ground as that to repeal a patent for land. (*United States v. Gunning*, 21 *Blatchf. C. C. R.*, 516.) In a suit to vacate a patent for land, it would hardly be claimed that the patentee should be restrained from preventing, or prosecuting suits for, trespasses to the land, during the pendency of the suit. Such acts would work no injury to the title or property of the United States, in question in the suit. The United States deals with the lands as a proprietor, and brings such suits to be restored to its proprietary rights. (*United States v. Schurz*, 102 *U. S.*, 378; *United States v. Stone*, 2 *Wall.*, 525.) Protection of the property would not impair those rights. Infringement of a patent is a trespass upon the exclusive rights granted. The United States, as an owner or proprietor, has no interest in promoting such trespasses; and their prevention, or the prosecution of suits for their commission, cannot be an injury to the United States, as a proprietor. If the patent is repealed, the suits may fall, or may not; but, whether they do or not is a matter entirely between the parties to the suits, and not at all between the United States and either of

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the parties. No reason for granting the motion appears, and it must, therefore be denied.

Motion denied.

Elihu Root, (District Attorney,) *Charles M. Da Costa* and *Wagner Swayne*, for the plaintiffs.

Frederic H. Betts, for the defendant.

GERHARD LUYTIES AND OTHERS

vs.

FREDERICK HOLLENDER AND OTHERS. IN EQUITY.

Where a trade-mark is registered under the Act of March 3d, 1881, (21 *U. S. Stat. at Large*, chap. 138, p. 502,) an injunction to restrain its use will not be granted as to mineral waters not intended to be transported to a foreign country, nor for any Indian tribe, but sold for consumption in the City of New York, and where the parties to the suit are all citizens of the State of New York.

(Before WHEELER, J., Southern District of New York, August 9th, 1884.)

WHEELER, J. Rights and remedies pertaining to trade-marks generally depend upon the laws of the State, common and statutory, and not upon the laws of the United States. (*Trade-Mark Cases*, 100 *U. S.*, 82.) The laws of the United States now in force, under which this trade-mark was registered, relate only to trade-marks specially used in commerce with foreign nations, or with the Indian tribes. (*Act of March 3d*, 1881, 21 *U. S. Stat. at Large*, chap. 138, p. 502, sec. 1.) They are particularly restricted so as not to give cognizance to any Court of the United States, in an action or suit between citizens of the same State, unless the trade-mark in

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controversy is used on goods intended to be transported to a foreign country, or in lawful commercial intercourse with an Indian tribe. (*Id.*, sec. 11.) The goods on which the trademark in question is used are not intended to be transported to any foreign country, nor for any Indian tribe, but are mineral waters sold for consumption in the City of New York; and the parties are all citizens of the State of New York. As this case is now presented, the orators are not entitled to maintain it in this Court, and this motion for a preliminary injunction must be denied.

Samuel T. Smith, for the plaintiff.

Louis C. Raegener, for the defendants.

JOHN WHITE vs. JAMES BOYCE. IN EQUITY.

Where A. has agreed, in writing, to transfer to B. certain shares of stock, on specified conditions, and B. has agreed, in writing, to pay a specific sum of money therefor, B. cannot be allowed to show a verbal agreement that he was to sell the stock as agent for A.

If B. claims that there was fraud in the sale of the stock to him, his remedy is at law, for damages, and not in equity.

(Before WALLACE, J., Southern District of New York, August 11th, 1884.)

WALLACE, J. The complainant's bill is filed to enjoin the prosecution of a suit at law, pending in this Court, brought by the defendant, to recover damages against the complainant for the conversion of 5,900 shares of the stock of the Montauk Gas Coal Co. Of these shares, 5,400 belonged originally to the complainant, and 500 to the defendant. The complainant had pledged his 5,400 shares to the defendant, as collateral security for certain liabilities of his to the defendant, and, on July 19th, 1880, the defendant transferred them, together with his own 500, to the complainant, to be held by him as

trustee, for the purposes of a pool of the stock of the company, until February 1st, 1881. After the expiration of the pool period, (the stock still remaining in the possession of the complainant,) the defendant demanded its re-delivery, and, upon the complainant's refusal to comply, brought the suit at law for its conversion. The present controversy does not concern the defendant's right to recover in the suit at law for the conversion of the 500 shares originally owned by him, and delivered to the complainant for the purposes of the pool; but the complainant asserts, that, as to the 5,400 shares, there was, at the time of the alleged conversion, nothing owing from the complainant to the defendant, upon a fair accounting of their affairs together, and that he is the equitable owner thereof, although he has never satisfied the specific conditions of the pledge.

The 5,400 shares were pledged by the complainant to the defendant in the course of transactions between them growing out of the formation of the Maryland Union Coal Co. and the sale of the stock of that company, 2,400 shares being pledged about March 3d, 1880, and 3,000 shares September 27th, 1880. The defendant was the owner of extensive coal property in Maryland, and engaged in mining coal, and resided at Baltimore; and the complainant was a dealer in coal and in coal stocks, residing at New York. Prior to November, 1879, negotiations took place between the parties in reference to placing the defendant's coal property upon the market. These culminated in the organization of a corporation, the Maryland Union Coal Co., the transfer of the property by the defendant to that corporation, in exchange for 49,995 of the 50,000 shares of the capital stock, and a written contract between the complainant and the defendant, made November 22d, 1879, whereby the defendant agreed to hold three-fourths of the stock of the corporation subject to an option to the complainant to purchase the same. By the terms of the agreement, the defendant was to transfer to the complainant one-quarter of the stock, upon the payment by the complainant of \$287,500 in three months, another quarter upon a similar payment in five months, and the re-

maining quarter upon the payment of a similar sum in nine months. Upon the complainant's failure to pay for the first quarter as agreed, the option was to expire. The defendant was to pay \$37,500, of each payment into the treasury of the company for working capital, and, when the three-quarters of the stock had been taken and paid for by the complainant, the defendant was also to pay an additional \$37,500 into the treasury, as representing a contribution to the working capital of the corporation, upon the quarter of the stock retained by him.

At the expiration of the time for the transfer of the first quarter of the stock, the complainant was unable to comply with the terms of the option; the terms were extended by the defendant; and, on March 3d, 1880, a new agreement was made between the parties, reciting that the complainant had paid for the first quarter of the stock under the option, and providing for an extension of time for the payment by him for the other two quarters. At the time this agreement was made, and in order to facilitate the operations of the complainant in selling the stock to third persons, the parties entered into another agreement, by the terms of which the defendant agreed to advance \$150,000, to a bank in New York City, for the purpose of enabling the bank to make loans on the shares of the company, and the complainant agreed to keep \$60,000, of the stock of the Montauk Coal Co. in the hands of the defendant, as collateral security, to protect him against any losses that might arise from the loans that might be made by the bank. Under this agreement, the defendant received 2,400 of the 5,400 shares of the gas company now in controversy. September 27th, 1880, the complainant wished to obtain 1,000 shares of the coal company stock, which he had agreed to deliver to purchasers. He obtained these shares from the defendant, and, as security for \$25,000, the purchase price thereof, made a pledge of 3,000 more of the stock of the gas company. This stock was then in the custody of one Bush, for the purposes of the pool in the stock of that company, before referred to, and the pledge was made in form by Bush.

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The facts are undisputed, that a loss resulted to the defendant arising from the loans made by the bank out of his moneys and to secure which the first pledge was made by the complainant; and, also, that the defendant has never been paid the \$25,000, for the stock obtained of him by the complainant, as security for which the last pledge was made by the complainant.

But the complainant's theory is, that, throughout all the transactions between the parties he was only the agent of the defendant in effecting a sale of his mining property; that the Maryland Union Coal Company was organized, and the two agreements giving the complainant an option to purchase its stock were made, for the purpose of putting the stock upon the market, and to enable the complainant to obtain subscriptions and sell the stock to others, as the agent of the defendant and for his benefit; that, in fact, it was agreed between the parties that the complainant should receive for his services in the matter all proceeds of the sale of the stock above the sum of \$22 per share; that the defendant had represented to him that the coal lands contained at least 350 acres of big vein coal, which fact, if true, would have made the property extremely valuable; that, relying upon this agreement and the representations by the defendant as to the big vein coal, he had, in fact, placed 18,400 shares of the stock with third parties, who had agreed to purchase the same at the price of \$30 per share; that, after he had sold part of the stock, and before the remainder had been delivered to or paid for by the persons who had agreed to take the same, it was discovered that the defendant's representations as to the big vein coal were untrue, and the complainant was unable to induce those who had agreed to purchase the stock to carry out their agreements, and, in consequence thereof, he sustained a loss in a sum more than sufficient to satisfy any claims of the defendant upon the stock of the gas company pledged to him; and that, by reason of the premises, he is entitled to recover \$142,000, of the defendant, as damages upon a fair accounting.

The proofs, undoubtedly, authorize the conclusion, that

the Coal Company was organized for the purpose of enabling the defendant to dispose of his coal property, by exchanging it for the stock of the corporation and selling the stock, and that the option for the purchase of the stock, given to the complainant by the contracts of November 22d, 1879, and March 3d, 1880, was given in order to carry out that object and enable the defendant to dispose of three-quarters of his interest in the property. It is also apparent, that the defendant understood that the complainant intended to place the stock with subscribers, or sell it to purchasers, and thereby obtain the means of carrying out his option contract.

Whether, in carrying out this plan to effect a sale of the defendant's property, it was the intention of the parties that the relation of principal and agent should exist between themselves, or whether it was intended that the complainant should occupy the position of a speculator on his own account instead of a fiduciary, are questions as to which there is much conflicting testimony. Concededly, if there was any agreement between the parties other than that expressed in the written contracts between them, it was made prior to or contemporaneously with, the written contracts. However the fact may have been, no inquiry into the preliminary or contemporaneous negotiations of the parties is competent for the purpose of showing that they were dealing together as principal and agent; because, extrinsic evidence to this effect would contradict or vary the legal import of the written contracts. By these contracts, the defendant agreed to transfer certain shares of stock to the complainant, upon specified conditions, and the complainant agreed, upon receiving such transfer, to pay therefor to the defendant a specific sum of money. The complainant cannot now be permitted to show by parol that he was not to acquire an unqualified right to the stock which was to be delivered to him, or that he did not assume an absolute obligation to pay for it, when delivered, at the price fixed; and such would be the result if he should be allowed to prove that he was to sell the stock to third persons as an agent for the defendant, and was to account to him at the

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rate of \$22 per share. He who contracts as a principal will not be permitted to show, in the absence of mistake, fraud or illegality, that he contracted as an agent, in a controversy between himself and the other contracting party, (*Wharton on Agency*, §§ 410, 492;) and the knowledge of the other contracting party of his real character does not affect the rule. (*Taylor on Ev.*, § 1,054.) The case is not like those where a part only of a verbal contract has been reduced to writing, (*Potter v. Hopkins*, 25 *Wend.*, 417; *Batterman v. Pierce*, 3 *Hill*, 171; *Grierson v. Mason*, 60 *N. Y.*, 394,) or where an agreement collateral to the written agreement is set up, (*Lindley v. Lacey*, 17 *C. B.*, (*N. S.*) 578; *Chapin v. Dobson*, 78 *N. Y.*, 74; *Crosman v. Fuller*, 17 *Pick.*, 171,) which does not interfere with the terms of the written contract, though it may relate to the same subject-matter. The written contract here is of the very essence of the transaction between the parties, and creates the relation of vendor and purchaser between them. It fixes their mutual rights and obligations, and cannot be subverted by extrinsic evidence. As is stated by Denio, J., in *Barry v. Ransom*, (12 *N. Y.*, 464,) "the legal effect of a written contract is as much within the protection of the rule which forbids the introduction of parol evidence, as its language."

It is not claimed that there was any subsequent modification or change in the relations of the parties. The complainant's right to relief must, therefore, rest upon the theory that his vendor misrepresented to him material facts affecting the value of the stock purchased. If it should be assumed that his allegations in this regard are established by the proofs, he must fail, because his case does not entitle him to any equitable relief. No facts are alleged in the bill as a foundation for an equitable set-off; no discovery is asked; and no facts exist which tend to show that the complainant has not a plain, adequate and complete remedy at law to recover such damages as he may have sustained. While Courts of equity have concurrent jurisdiction in all cases of fraud, they will not, ordinarily, exercise it, if there is a full and adequate rem-

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edy at law, (*Bispham's Eq.*, § 200; *Ambler v. Choteau*, 107 U. S., 586;) and the Federal Courts are especially admonished not to entertain such cases. The statutory enactment, (§ 16 of the *Judiciary Act*; § 723, *U. S. Rev. Stat.*), if only declaratory of the pre-existing law, is, at least, intended to emphasize the rule and impress it upon the attention of the Court. (*New York Co. v. Memphis Water Co.*, 107 U. S., 205.) It is the duty of the Court to enforce this rule *sua sponte*. (*Oelrichs v. Spain*, 15 Wall., 211; *Sullivan v. Portland R. R. Co.*, 94 U. S., 806.) It would, therefore, not be proper to assume to determine the question of fact, whether any misrepresentations were made to the complainant by the defendant.

Jurisdiction properly assumed upon one aspect of the controversy would authorize the Court to proceed to a decree which would do full justice in the case upon all its branches. But, unfounded claims of a character cognizable in equity cannot be made the basis of relief respecting other controversies between the parties which are cognizable only at common law.

The bill is dismissed, with costs.

Coles Morris, for the plaintiff.

William G. Wilson, for the defendant.

The Goodyear Rubber Co. v. Goodyear's India Rubber Glove Mfg. Co.

THE GOODYEAR RUBBER COMPANY

vs.

GOODYEAR'S INDIA RUBBER GLOVE MANUFACTURING COMPANY,
GOODYEAR'S RUBBER MANUFACTURING COMPANY, GEORGE
M. ALLERTON AND JOHN D. VERMEULE. IN EQUITY.

The question of the right to use the name, "Goodyear's Rubber Mfg. Co.," as between two corporations, considered, and decided in favor of the plaintiff, such name being conceded by both parties to be practically identical with the plaintiff's name.

(Before WALLACE, J., Southern District of New York, August 15th, 1884.)

WALLACE, J. The complainant is a corporation organized under the laws of New York, in 1872, by its present corporate name. The defendant is a corporation organized under the laws of Connecticut, in 1847, by its present corporate name. Each corporation seeks to enjoin the other, the complainant by bill and the defendant by cross-bill, from using the name, "Goodyear's Rubber Mfg. Co." Both parties concede this name to be practically identical with the complainant's name.

The parties are competitors in the manufacture and sale of rubber goods, and have their principal places of business in the city of New York. Each insists that it has acquired the right to the use of the name in dispute, and that such name has become a valuable adjunct of its business; and each insists that the other has endeavored, and is now attempting, by a wrongful use and appropriation of the name, to divert the custom of the other. As each party concedes that the right to use the name for the purposes of its business is a valuable property right, and asserts that such use by the other is vexatious, embarrassing, and necessarily tends to pecuniary injury, the controversy manifestly resolves itself mainly into

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a question of title to the name. It is incumbent upon one of the parties to establish a lawful right to the use of the name, as against the other; and the party which does this will be entitled to the relief prayed for.

The name of a corporation has been said to be the "knot of its combination," without which it cannot perform its corporate functions. (*Smith's Mer. Law*, 39.) It has neither the right nor the power to change the corporate name originally selected, without recourse to such formal proceedings for the purpose as may be authorized by the laws under which it has been incorporated, or by the consent of the authority from which its charter is derived. Nevertheless, it may become known by another name, by usage; and the Courts have frequently treated acts done and contracts entered into by a corporation under another name, as though done or entered into by it with the true name. (*Minot v. Curtis*, 7 *Mass.*, 441; *South District v. Blakeslee*, 13 *Conn.*, 227; *Eastham v. Blackburn Ry. Co.*, 23 *L. J., Ex.*, (*N. S.*) 199; *Boisgerard v. N. Y. Banking Co.*, 2 *Sandf. Ch.*, 23.) There is no reason why a corporation may not acquire a property right to the use of another name, as a trade-mark, or as incidental to the good will of a business, as well as an individual: and, if it has acquired such a right, it will, of course, be protected in its enjoyment, to the same extent as an individual would be. It cannot be deprived of the right by the assumption of the name subsequently by another corporation; and it is immaterial whether the latter selects its name by the act of incorporators who organize under the general laws of a State, or whether the name is selected for it in a special Act, by a legislative body.

Manifestly, if the defendant had no right to use the name by which the complainant was incorporated, or one practically identical with it, at the time of the latter's incorporation, the title of the complainant is clear; because it adopted the name formally, publicly, and legitimately, for all its corporate purposes. The defendant insists that it had acquired a prior right to the use of the name; and that this

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right took its origin as early as 1862, and, by a gradual process of development, had ripened into a good title before the complainant was incorporated.

Neither party makes any claim of exclusive right to use the word "Goodyear" alone, that word having become a generic term of description applied to a large class of india rubber fabrics before either party became a corporation; or to the word "Goodyear" in combination with "Rubber." There were trading concerns called "The Goodyear Metallic Shoe Co.," "The Goodyear Rubber Works," and "The Goodyear Rubber Emporium," before either party claimed the right to the name in controversy.

The defendant's theory, as sustained by the proofs, is that, beginning in 1862, when it ceased to confine itself to the manufacture of gloves, and engaged in manufacturing and selling rubber goods generally, its customers occasionally addressed it, in their correspondence, by various abbreviated names, such as "Goodyear's Rubber Mfg. Co.," "Goodyear Rubber Co.," "Goodyear's Co.," "Goodyear's I. R. Company," "Goodyear Company," and other abbreviations; that the use of such abbreviated addresses by its customers gradually increased, so that, in 1871, the defendant received nearly 200 letters addressed to the Goodyear Rubber Company, and nearly 100 to the Goodyear Rubber Mfg. Co.

On the other hand, the proofs show, that, during this time, the defendant received many thousands of letters yearly; that the letters addressed to it by other names were comparatively a small number, averaging not over 500 a year, but embraced upwards of seventy varieties of names; and that its correct corporate name was usually adopted by its correspondents and patrons.

It is not claimed that the officers or agents of the defendant were accustomed, during any part of this period, to use any other than its corporate name, or assumed the right to do so until after the complainant commenced business. To the contrary, they were solicitous and painstaking to correct the tendency of its customers to address it by any other than its

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corporate name ; and it was their practice to send envelopes to customers with its correct name printed upon them, to prevent the occurrence of such mistakes.

Concisely stated, the question would seem to be, whether the defendant can appropriate to itself the various misnomers applied to it by the carelessness or inaccuracy of a comparatively small number of its customers during a period of ten or eleven years, notwithstanding the zealous and active measures of its managers to repress the practice, and their success in preventing it from ripening into a general usage. It would hardly be contended that an individual could found a claim of possessory right to any species of property upon the unauthorized conduct of other persons, or maintain that he had adopted a name symbolizing his products or identifying his personality with his business, by protesting against its use.

The proofs show that there was no general recognition of the defendant among its customers by any other than its corporate name, and no adoption by the defendant of a different name ; and it must be held, that the occasional or persistent use of the misnomer by a few of the defendant's customers, gave no privilege to the defendant to a monopoly in the use of the name.

If the proofs warranted the inference that the complainant assumed a name by which the defendant was known, for the fraudulent purpose of deceiving the public, and of supplanting the defendant in the good will of its business, the Court would not only refuse to assist the complainant, but would intervene to protect the defendant. A careful reading of the proofs fails to disclose the existence of any such design, or of any intention to adopt a name with which the defendant had already become appreciably identified. The case is destitute of evidence to indicate that the complainant's corporators were aware, or had reason to suppose, that the defendant had become known, to any extent, by any other name than its corporate name. So far as appears, they had no knowledge that the defendant's customers ever addressed it by other names. Nor is there anything in the proofs to justify the intimation, that

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the complainant was organized for the purpose of annoying the defendant by illegitimate competition. It does appear, that the persons who organized the complainant had been the managers and agents of another corporation, the Rubber Clothing Company, which, for many years, had been a competitor of the defendant at the city of New York; that propositions for a consolidation of this company with the defendant had been somewhat discussed between their respective managers, without result; and that, shortly afterwards, the complainant was organized. For a time its affairs were transacted at the office of the Rubber Clothing Company, and the two concerns maintained very intimate relations, as might be expected from the circumstance that the managers were the same persons in both. But the salient facts, that the new corporation started with a cash capital of \$500,000, and engaged in new branches of trade, while the old company continued in business, sufficiently refute any theory that the complainant was not a *bona fide* concern. If it should be conceded that the two concerns were practically one, and that the main object of the complainant's organization was to enable the Rubber Clothing Company to assume a new name, one which would represent a corporation dealing in rubber articles generally, instead of in clothing only, there would be no occasion for censure, because the new name was better adapted to describe the business of the corporation. The Rubber Clothing Company had long ceased to manufacture and sell clothing only, and had become engaged in selling rubber goods generally. It was undoubtedly intended, by those who organized the new concern, to engage in the general rubber trade, upon a more extensive scale than that of the old company. The name selected was an appropriate one, and those who adopted it had a perfect right to do so, provided they did not know, or have reason to believe, that, by doing so, they would interfere with the business of the defendant. The fact seems to be, that both the Rubber Clothing Company and the defendant were doing business under names that were somewhat misleading to such persons as had not learned, by business intercourse with

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them, that they were manufacturers and dealers in rubber goods generally. It would have been entirely proper for either of them to adopt a new name. The complainant adopted a new name first, and, if it was only the Rubber Company with a new name, the defendant had no right to complain, so long as the name did not serve to engender unfair competition and deceive the trade. As has been said, however, it was a new concern, with a large capital, and contemplating enlarged business operations, and the proofs do not show that its corporators were moved to select its name by any illicit motive towards the defendant. If the name selected was one calculated, by its similarity to the defendant's name, to lead to confusion of business, and to confounding the identity of the two corporations, it might well be urged that those who adopted it should abide by the consequences, although they were innocent in their intentions, and not ask a Court of equity to protect them against the inconveniences which might follow. But the defendant, not content that the consequences shall rest where they fall, insists upon the exclusive right to use the name, and, since the complainant assumed it, has issued notices and circulars to the trade, and put up a sign, calling itself by the complainant's name. Upon the same theory, it can also claim the exclusive right to use the multitude of misnomers applied to it from time to time by its careless customers. It has a distinctive name of its own, which it formally adopted, and which has been carefully preserved by its agents until the complainant selected one. It ought not to complain now because the latter was the first to avail itself of the choice of selection, out of all unappropriated names. Certainly it cannot be permitted to appropriate the complainant's name, or one substantially identical, and, by asserting itself as the veritable Goodyear Rubber Company, mislead the public to the detriment of the complainant.

A decree is ordered for the complainant, and the cross bill of the defendant is dismissed.

William W. McFarland, for the plaintiff.

Frederic H. Betts, for the defendants.

 Matthews v. The Iron Clad Manufacturing Company.

ELIZABETH MATTHEWS AND GEORGE MATTHEWS, AS SURVIVING
EXECUTORS OF THE LAST WILL AND TESTAMENT OF JOHN
MATTHEWS, DECEASED

vs.

THE IRON CLAD MANUFACTURING COMPANY. IN EQUITY.

Claims 1, 2 and 3 of re-issued letters patent No. 8,834, granted to John Matthews, August 5th, 1879, for an "improvement in soda-water fountains," on an application for re-issue filed June 26th, 1879, the original patent, No. 128,411, having been granted to said Matthews, June 25th, 1872, for 17 years from June 13th, 1872, namely, "1. The combination of the inner continuous tin fountain, A, having neck, b, with the rigid inclosing shell, made in sections, substantially as herein shown and described. 2. The tin vessel, A, inclosed by a cylinder, C, and ends, BB', in the manner substantially as described, as a new and improved article of manufacture, for the purpose specified. 3. The combination of the inner vessel, A, with the exterior covering, made in sections, which are united after being placed around the vessel, A, substantially as specified, the inner vessel being entirely continuous within the covering," are invalid.

The text of the specifications of the original patent and the re-issue was the same; the original had one claim, namely, "The tin vessel, A, incased by a steel cylinder, C, and ends, BB', soldered to the latter, in the manner substantially as described, as a new and improved article of manufacture, for the purpose specified;" the invention set forth in the original patent was a structure having these features: (1) a tin vessel or lining, A; (2) incased by a steel body or cylinder, C; (3) the outer end caps or ends, BB', soldered to the steel body or cylinder, C, without flanges or projections, by tin joints, made by soldering with pure tin, instead of by a solder having lead in it; the claim was adequate to secure that invention; there was no inadvertence, accident or mistake; the first three claims of the re-issue, by omitting all limitation to the method of soldering, enlarge the invention and the claim, so as to cover structures which came into existence after the original patent was granted, and before the re-issue was applied for; it was applied for seven years after the original was granted, and, during that interval, the defendant engaged in making the alleged infringing structures; and they did not infringe the claim of the original patent.

Claim 1 of re-issued letters patent No. 8,837, granted to John Matthews, August 5th, 1879, for an "improvement in soda-water apparatus," on an application for re-issue filed June 26th, 1879, the original patent, No. 137,702, having been granted to said Matthews, April 8th, 1873, namely, "1. The combination of the cock A, having recessed flange a, and packing x, in the recess,

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with the bung C, and shell or body D, of the fountain, substantially as herein shown and described," considered.

The invention covered by that claim was on sale more than two years before the application for the original patent.

The five claims of letters patent No. 159,433, granted to John Matthews, February 2d, 1875, for an "improvement in vessels containing gases and liquids under pressure," considered.

The first four claims of that patent are not infringed by a structure which is not a lamellar vessel, and has no lamellar cap or end, and no cap or end made by sweating together a number of caps coated with a soldering metal, but only has reinforcing washers at the end where there is an aperture.

As to claim 5 of that patent, namely, "5. The combination of the re-enforcing washers *d* with the end or body of the vessel, so as to re-enforce the parts weakened by apertures, as set forth," the state of the art was such, that there was no invention in applying a re-enforcing washer to an aperture in a structure like the defendant's; and such a washer as the defendant's existed substantially before Matthews' invention.

Moreover, the invention was extensively used by Matthews, in his regular business, more than two years before he applied for the patent.

Claim 1 of letters patent No. 179,583, granted to John Matthews, July 4th, 1876, for an "improvement in fountains containing aerated beverages," namely, "1. A metallic bung, provided with a recess, *c*, in combination with faucet, *e d*, substantially as described," is not infringed by a structure which has no washer in the bung casting, nor any recess for a washer; and, as a washer in a recess in a cock, to pack a joint, existed before, it hardly amounted to a patentable invention to change the position of the recess from the cock to the bung, there being no other result than convenience.

Claim 2 of that patent, namely, "2. In a fountain, a lining carried over the inner face of a metallic bung, and soldered thereto, substantially as shown, so as to protect the bung against corrosion, as set forth," does not, in view of the state of the art, claim a new or patentable invention.

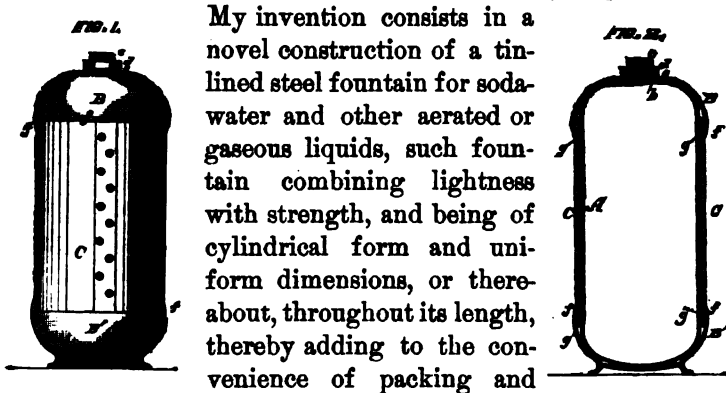
(Before BLATCHFORD, J., Southern District of New York, August 21st, 1884.)

BLATCHFORD, J. This suit is brought on four patents: Re-issue No. 8,834, granted to John Matthews, August 5th, 1879, for an "improvement in soda-water fountains," on an application for re-issue filed June 26th, 1879, the original patent, No. 128,411, having been granted to said Matthews, June 25th, 1872, for 17 years from June 13th, 1872; re-issue No. 8,837, granted to John Matthews, August 5th, 1879, for an "improvement in soda-water apparatus," on an application for re-issue filed June 26th 1879, the original patent, No. 137,702, having been granted to said Matthews, April 8th,

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1873; letters patent No. 159,433, granted to John Matthews, February 2d, 1875, for an "improvement in vessels containing gases and liquids under pressure;" and letters patent No. 179,583, granted to John Matthews, July 4th, 1876, for an "improvement in fountains for containing aerated beverages."

The specification of re-issue No. 8,834, referring to the drawings which accompany it, says: "Figure 1 is an exterior longitudinal view, and Fig. 2 a central longitudinal section, of a fountain constructed in accordance with my improvement.



My invention consists in a novel construction of a tin-lined steel fountain for soda-water and other aerated or gaseous liquids, such fountain combining lightness with strength, and being of cylindrical form and uniform dimensions, or thereabout, throughout its length, thereby adding to the convenience of packing and handling; also, being exempt from expansion or permanent lateral distention by the interior pressure to which it is subjected, thus preserving its form and contributing to its durability. Fountains for the like purpose, as previously made, have been largely expansive, and retained the set given to them by extension, and being otherwise objectionable. In the accompanying drawings, A represents a block-tin interior body of cylindrical form, with hemispherical or reduced ends, the same constituting the tin lining of the fountain, and being provided, at one of its ends, with a neck, b, for the introduction of the usual or any suitable connections by which the fountain is charged and its contents drawn off, said neck receiving or having screwed into it a screw-coupling, c, secured by a nut and washer, d, on the exterior of an outer end-cap, B, for making the connection. C is the exterior shell or body

proper, made of galvanized sheet steel, as may also be the end-caps, B B', which are soldered to or over the extremities of the same, and constitute, as it were, parts of said body C, that surrounds or fits over the tin lining A. The end-caps, B B', are united to the body C, without flanges or projections, by tin joints, as at *ff*, made by soldering with pure tin, which, being a ringing metal, unites closely with the steel exterior to make a firm and durable joint, as other solders having lead in them will not do. Bands, *gg*, of brown paper or other non-conducting material are introduced between the tin lining, A, and steel body C, at the ends of the latter, to prevent the tin of the lining from being melted by the heat used in making the pure tin joints *ff*. The fountain is also filled with water for the same purpose, prior to making said joints. The non-stretching character of the body C, by reason of the same being of steel, insures the fountain preserving its shape, and the absence of end flanges provides for the close packing of a series of such formations when transporting or storing them." The claims of No. 8,834, four in number, are as follows: "1. The combination of the inner continuous tin fountain, A, having neck, *b*, with the rigid inclosing shell, made in sections, substantially as herein shown and described. 2. The tin vessel A, incased by a cylinder, C, and ends, B B', in the manner substantially as described, as a new and improved article of manufacture, for the purpose specified. 3. The combination of the inner vessel, A, with the exterior covering, made in sections, which are united after being placed around the vessel, A, substantially as specified, the inner vessel being entirely continuous within the covering. 4. The combination of the inner vessel, A, with the surrounding covering or shell, and with intermediate bands, *gg*, of paper or non-conducting material, substantially as specified." Claims 1, 2 and 3 are alleged to have been infringed.

The text of the specification of No. 128,411, is identical with that of No. 8,834, as above quoted, except that, in No. 128,411, the word "closely" is inserted between the words "body C, that" and the words "surrounds or fits." No.

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128,411 had only one claim, as follows: "The tin vessel, A, incased by a steel cylinder, C, and ends, B B', soldered to the latter, in the manner substantially as described, as a new and improved article of manufacture, for the purpose specified.

It is contended for the defendant, that No. 8,834 is void as to the first three claims, because it was applied for and granted, with expanded and generalized claims, after a delay of seven years in applying for a re-issue. The descriptive parts of the two specifications are identical except as to the word "closely." The omission of that word is not a restriction.

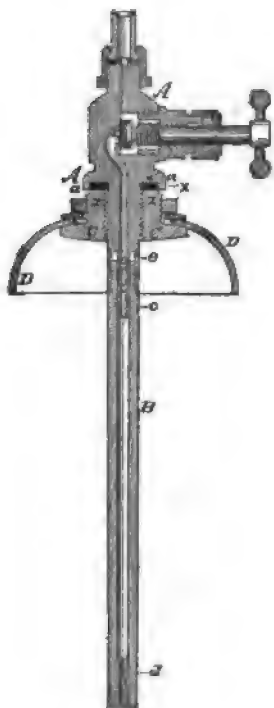
The novel construction of a tin-lined steel fountain, in which the invention is stated, by the original specification, to consist, is shown, by the claim of the original, to be a structure having these features: (1) a tin vessel or lining A; (2) incased by a steel body or cylinder C; (3) the outer end-caps or ends, B B, soldered to the steel body or cylinder C, without flanges or projections, by tin joints, made by soldering with pure tin, instead of a solder having lead in it. The text of the original specification, in its descriptive part, shows that this was the invention. The claim was adequate to secure that invention. There was nothing ambiguous or obscure or deficient in the claim, to secure that invention. There was no inadvertence, accident or mistake, and there is no attempt, by proof, to show that there was. The fact that the descriptive parts of the two specifications are alike shows that the sole object was to change the claim, and as the new claims are not restrictive, they are for a different and enlarged invention, in so far as they are different claims. The first three claims omit all limitation to the method of soldering the end-caps to the cylinder or body by tin joints, which is an indispensable element of the invention set forth as the invention in the original specification, and such omission enlarges the invention and enlarges the scope of the claims. The new claims are sought to be used to cover structures which came into existence after the original patent was granted but before application was made for the re-issue, and that application was

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not made until seven years after the original patent was granted. During that interval the defendant engaged in making the structures alleged to infringe. It is apparent that the plaintiff knew this and took his re-issue in order to be sure and have claims which would cover the defendant's structures. They did not infringe the claim of the original patent. The sections of their outer shell were not and are not united by tin solder, nor were or are the structures without flanges or projections. The case must be controlled by the rulings in *Miller v. Brass Co.*, (104 U. S., 350;) *James v. Campbell*, (*Id.*, 356;) *Matthews v. Machine Co.*, (105 *Id.*, 54;) *Bantz v. Frantz*, (*Id.*, 160;) *Johnson v. Railroad Co.*, (*Id.*, 539;) *Gage v. Herring*, (107 *Id.*, 640;) *Clements v. Odorless Excavating Apparatus Co.*, (109 *Id.*, 641;) *McMurray v. Mallory*, (111 *Id.*, 97;) *Turner & Seymour Mfg. Co. v. Dover Stamping Co.*, (*Id.*, 319.)

The first three claims of No. 8,834 are adjudged to be invalid.

The specification of re-issue No. 8,837, referring to the drawing which accompanies it, says: "The drawing represents a vertical central section of my improved soda-water apparatus. This invention relates, first, to a new manner of forming a tight joint between the body and the cock of a soda-water fountain; * * * The invention consists, first, in forming a recess in the flange of the cock, opposite the projection of the bung, for the reception of a soft, metallic or other packing. I have, previous to this invention, used an annular packing in a recess in the fountain-top; but that construction renders it difficult to insert and replace the packing. It is much easier to replace it on the flange of the cock.



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I also find that this improvement effects a great saving of gas, which is wasted if the joint is imperfect. * * * In the accompanying drawing, the letter A represents a stop-cock having a flange, *a*, and a downwardly projecting extension or lower part below said flange. C is the bung, which projects from the fountain-body through an aperture in the shell or body D of the fountain. The flange *a* of the cock is directly above said bung, and is recessed at its under side to receive a soft metal or other packing, *x*. The projection, *z*, of the bung of the fountain, fits up into this recess, and impinges on the packing which is contained in the recess of the flange *a*. The packing, *x*, is prevented from spreading by the sides of the recess, and thus makes a perfect joint. * * * " There are five claims in No. 8,837. Claim 1, the only claim alleged to have been infringed, is as follows: "1. The combination of the cock A, having recessed flange *a*, and packing, *x*, in the recess, with the bung, C, and shell or body, D, of the fountain, substantially as herein shown and described."

The specification of the original patent said: "A A is a stop-cock with a projection of pure tin into the fountain; *aa* is the flange of the cock; *xx* is a packing of soft metal or other substance. *zz* is the lip of the bung fountain. * * * The improvement relates, first, to a new method of closing the joint between the fountain and the stop-cock; * * * The first improvement is this: The flange *a* of the cock, which beds down on the bung surmounting the fountain, is recessed so as to form a matrix to receive a soft metallic or other packing *xx*. The lip, *zz*, of the bung of the fountain fits up into this recess, and impinges on the packing, which is prevented from spreading by the sides of the recess, and thus makes a perfect joint. I have for some years used an annular packing in a recess in the fountain-top, but that construction necessitates the removal of the fountain when the packing has to be replaced. It is much more convenient to have the packing in the flange of the stop-cock, as it is more portable than the fountain, and, if alloys are used, it is more convenient to

send the stop-cock, to have them replaced, than the large fountain. I find this improvement effects a great saving in the gas usually wasted if the joint is not very perfect. * * *

The claim of the original patent, on the above description, was this: "1. The combination of a soft metallic or other packing, *xx*, in a recess in the flange of the stop-cock, working against the lip, *zz*, on the bung of a soda-water fountain, as herein specified, so as to form a perfect joint between the cock and the fountain."

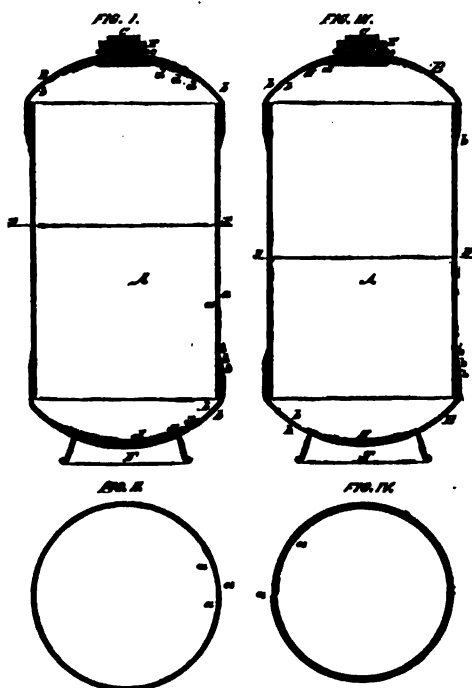
The description in the original patent is fully carried out in claim 1 of that patent. The packing in the recess in the flange works against the lip, *z*, of the bung, which lip fits up in the recess so as to impinge on the packing, the sides of the recess preventing the packing from spreading. That is the description in the original. The description in the re-issue is to the same effect. The projection *z* of the bung fits up into the recess and impinges on the packing, the sides of the recess preventing the packing from spreading. The cock, the flange, the recess, the packing, the bung and the body of the fountain are elements alike in the two claims, but the lip *z* on the bung, which is named in claim 1 of the original, is not named in claim 1 of the re-issue. It would seem to have been designed to make claim 1 of the re-issue cover a structure in which the lip *z* does not fit up into the recess; but it would also seem that the combination cannot be, in the language of claim 1 of the re-issue, a combination of the recess and its packing with the bung "substantially as herein shown and described," unless the bung has a lip fitting into the recess, and in such way as to allow the sides of the recess to prevent the packing from spreading as the lip impinges on the packing.

But the defence is set up, that what is covered by claim 1 of the re-issue was in public use and on sale in the United States for more than two years before the patentee's application for his original patent. The date of that application was March 21st, 1873. This defence is established in regard to the sale of two fountains each containing a cock embracing the

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arrangement covered by claim 1, by William Gee, in the year 1870, to one Joslin; and in regard to the sale of two others, each containing a cock with the like arrangement, by Gee, in the year 1868, to one Butler. The answer sets up this defence with all the particularity necessary. It is not necessary to examine any of the other anticipations alleged.

The specification of No. 159,433, referring to the drawings accompanying it, says: "Figures 1 and 3 are longi-



tudinal sections, and Figs. 2 and 4 cross sections, through lines *xx* and *yy* of Figs. 1 and 3 respectively. The object of this invention is to make strong vessels for containing liquefied gases highly condensed, or dissolved gases, which exert great pressure on the vessel. Such vessels, as heretofore constructed, are made of a single wall or shell, or of one or more single walls placed one within the other.

In my invention, I make the walls of the vessels lamellar, or of multiple shells united, so that each re-enforces the other. In the arts it is important to have very strong vessels, as the bursting of them occasions very serious consequences—sometimes, the loss of life. In my invention the multiple walls, which are made of tough metal, such as steel, are united together by tin or other soldering metal, so that any imperfections in one plate are corrected by the other plate or plates. In the drawing I have shown different modes of accomplishing this object. Thus, in Figs. 3 and 4, the body of the vessel is made by taking a plate of steel, coating it with tin, and then coiling it in a volute, and, after that, sweating together the several plies. The caps or ends are made by placing several caps one within the other, and sweating them together. I unite the caps and the body as in my patent of June 13, 1872, No. 128,411, or as described in another application filed of even date with this; or, instead of coiling the body, it may be made by placing one shell within another and sweating them together, and then putting on the caps as above. This form is shown in Figs. 1 and 2. Around the bung I place a number of washers, as shown in Figs. 1 and 3, so as to re-enforce that part. * * * By giving the walls a lamellar form, a greater average strength is obtained for a given weight of metal, since the strain is equally distributed, so that the principle is applicable to vessels requiring lightness as well as strength. The following description will enable those skilled in the art to make and use my invention. In the drawing, A is the body of the vessel, which is composed of two, three or more plies, as shown at *a a a*, and is made by inserting one closely-fitting vessel into another, as shown in Figs. 1 and 2, or by coiling to form a volute, as shown in Figs. 3 and 4. The caps B B are made of deep caps, two, three, or more in number, as shown at *b b b*. C is the bung-piece, with a broad flange on the inside. Between the cap and this flange are interposed a number of washers, *d d d*, so as to re-enforce the wall where it is weakened by openings. * * * If openings are required in the side or other part of the vessel, they

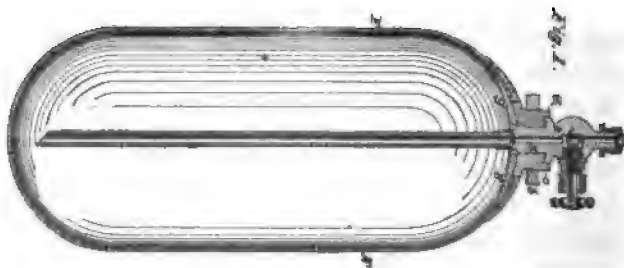
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should be strengthened by washers, such as shown at *ddd*. Instead of a single coiled plate, the body may be made of several plates spirally coiled, so that one breaks joint with the other. The plates are first tinned, and then put together, and afterwards sweated together, and also the seams and spaces between the plates, so as to unite all in one solid piece. The vessels formed in this manner are not only very strong, but resist the passage of gases much better than those made in the ordinary way. * * * The method of forming the cup-shaped caps, the kinds of metal to be used for the plates, and the processes of preparing them for use, being already known, and forming no part of this invention, need not be described. The following is the method of joining the seams which I use, and which is applicable to all kinds of vessels of iron and steel: I first galvanize or coat with zinc the whole of the sheet steel intended for the jacket or shell or shells, and then, by means of a blow-pipe, melt tin upon the surface intended to form the joints. This tin alloys itself with the zinc, forming a very fusible alloy, which is carefully wiped off clean. The process is then repeated until little or no zinc is left upon those portions intended to form the joints. These parts are afterwards united by means of tin solder, and a very firm joint is formed. This process constitutes a part of my invention." There are five claims, as follows: "1. The method herein described for forming strong vessels to contain gases and liquids under high pressure, consisting in coating a sheet of steel or other tough metal with tin or other soldering metal, coiling into a volute or spiral, and then sweating the parts together, substantially as set forth. 2. The method of forming caps or ends for strong vessels, consisting in sweating together a number of steel or other tough-metal caps, coated with a soldering metal, as set forth. 3. A lamellar vessel for containing liquids and gases under great pressure, having the several plies united by tin or soldering metal, as described. 4. A lamellar cap or end for strong vessels, composed of a number of caps united by soldering metal, as set forth. 5. The combination of the re-en-

forcing washers *d* with the end or body of the vessel, so as to re-enforce the parts weakened by apertures, as set forth."

It is very plain that the defendant's structure does not infringe any one of the first four claims of this patent. It is not a lamellar vessel, nor has it a lamellar cap or end, in the sense of this patent. Its cap or end is not made by sweating together a number of caps coated with a soldering metal. It has reinforcing washers, at the end where there is an aperture; but, if claim 5 of the patent is not to be confined to reinforcing washers applied to the end of such a lamellar vessel as the specification describes, the state of the art is shown to have been such that there was no invention in applying a reinforcing washer to an aperture in a structure such as the defendant's, at the time Matthews made his invention. Such a washer as the defendant uses existed substantially before Matthews' invention, in the Gee structure of 1870, and in analogous metal structures, such as generators for holding liquids under pressure. Aside from this, the patent was not applied for till August 7th, 1874, and the extensive use which Matthews made, from February, 1871, to February, 1872, in his regular business, of fountains with the aperture head reinforced by washers, the washers being numbered by thousands, cannot be regarded as a use for experiment. The experiment might as well have continued till now, to see if some one washer would not give way.

The specification of No. 179,583, referring to the drawing



accompanying it, says: "Figure 1 shows a longitudinal section of my invention. The improvement consists in forming

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the bung for the cock or plug of the fountain in such a manner that the recess for the soft metal or other washer is obtained. It also consists in protecting the inner face of the metal bung. In the drawing, *a* is the metallic bung; *F*, the fountain-case or shell; *b*, nut to hold the bung in position; *c*, recess for washer; *e*, body of faucet; *d*, screw-thread stem of faucet; and *g*, the lining of the fountain. Recesses in the top of the fountain-case have been long used, but may be more easily constructed by placing them in the bung, as shown, the bung being made of a separate piece of metal. The washers may also be more readily turned or trued. The first part of the invention, therefore, consists in forming a recess, *c*, in the top of the bung, so as to hold a washer between the bung and the screw-faucet stem. The second part of the invention consists in carrying the lining of the fountain over the flange of the bung, so as to protect the inner end of the bung. It is usual to carry the lining between the bung and the fountain-case. This leaves the bung, which is usually of brass, exposed to the action of the beverage, which thereby becomes contaminated. By carrying the lining, *g*, over the internal face of the bung, and soldering it thereon, the bung is protected against all action from the aerated water, or other beverage, and these are not liable to become contaminated. This invention is applicable to all kinds of fountains or reservoirs in which a metallic bung is inserted with a draft-faucet." There are two claims, as follows: "1. A metallic bung, provided with a recess, *c*, in combination with faucet *e d*, substantially as described. 2. In a fountain, a lining carried over the inner face of a metallic bung, and soldered thereto, substantially as shown, so as to protect the bung against corrosion, as set forth."

Two experts for the defendant testify that the defendant's structure, *E*, has no washer in the bung casting, nor any recess that would receive and support such a washer, and does not contain the combination covered by claim 1, even when the cock or faucet is screwed into the bung of *E*. Nor does any expert for the plaintiffs testify that the defendant

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has any such washer in a recess or any such recess for a washer. Moreover, a washer so confined in a recess in a cock, that it operated, when squeezed, to pack a joint, existed before; and it hardly amounted to a patentable invention to change the position of the recess from the cock to the bung, there being no other result than convenience.

As to claim 2 of No. 179,583, the specification is for "improvements in fountains for containing aerated beverages," and states that the invention covered by the two claims is "applicable to all kinds of fountains or reservoirs in which a metallic bung is inserted with a draft-faucet." Claim 2 is for a lining carried over the inner face of a metallic bung, and soldered to it, instead of being carried outside of the bung, so as to protect such inner face against corrosion. This claim is broadly for protecting a metallic bung by a lining of any material, soldered to the inner face of such bung, so as to prevent access of the contents of the vessel to such inner face. In view of the state of the art, as proved, there was nothing new or patentable in such a claim. The arrangement was an old one in generators, to protect the bung by carrying the lead lining over the inner face of the bung, to keep the acid of the liquid from the brass of the bung. Whether the lining was soldered to the bung or not, there was no invention in making it permanent by soldering or by any other effective mode of attachment, in view of the state of the art of soldering.

It results from these considerations, that, as to all the patents, the bill must be dismissed, with costs.

A. V. Briesen and H. L. Burnett, for the plaintiffs.

F. H. Betts and E. C. Webb, for the defendant.

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DANIEL SPILL

28.

THE CELLULOID MANUFACTURING COMPANY. IN EQUITY.

In this case, there was an interlocutory decree for the plaintiff, sustaining the validity of two patents, and awarding a perpetual injunction, and a reference before a master in respect to profits and damages, and a report by him in favor of the defendants, to which the plaintiff excepted. On the hearing of the exceptions, the Court reconsidered the case and dismissed the bill.

Letters patent, No. 97,454, granted to Daniel Spill, November 30th, 1869, for an "improvement in dissolving xyloidine for use in the arts," are invalid, for want of novelty, as to the claim for the preparation and use of camphor in conjunction with alcohol or spirits of wine, as a solvent of xyloidine.

The 2d claim of letters patent, No. 101,175, granted to Daniel Spill, March 22d, 1870, for an "improvement in the manufacture of xyloidine and its compounds," namely, "The process of bleaching xyloidine in the manner herein specified," rests only on the fact, that Spill discovered that xyloidine could be bleached by ordinary bleaching materials. But he merely applied the old process of bleaching by ordinary bleaching agents, to vegetable fibres, with no change in the manner of application, and with the same result; and this was not a patentable invention, in view of the state of the art, and of the decision in *Pennsylvania R. R. Co. v. Locomotive Engine Safety Truck Co.*, (110 U. S., 490.)

A petition for leave to file a supplemental bill in the nature of a bill of review is demurrable, if it does not show that the petitioner could not, with reasonable diligence, have discovered the alleged new matters set forth therein, prior to the hearing and decision of the case; and if the new matters do not appear to be material.

(Before BLATCHFORD, J., Southern District of New York, August 21st, 1884, and November 7th, 1884.)

BLATCHFORD, J. This suit was brought on two patents granted to the plaintiff. One is No. 97,454, granted November 30th, 1869, for an "improvement in dissolving xyloidine for use in the arts." The other is No. 101,175, granted March 22d, 1870, for an "improvement in the manufacture of xyloidine and its compounds." On a hearing on pleadings and proofs, a decision was made, (18 *Blatchf. C. C. R.*, 190.)

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in favor of the plaintiff, on both patents. An interlocutory decree was entered June 12th, 1880, declaring both patents to be valid and to have been infringed, and awarding a recovery of profits and damages, to be ascertained by a reference to a master, and a perpetual injunction. The report of the master was filed February 25th, 1884. The conclusions of the report, as matter of law, are, as to No. 97,454, that the master, not having been furnished with the necessary data, is unable, without further proof, to report any profits; and, as to No. 101,175, that, not having been furnished with the necessary data, he is unable, without further proof, to report any profits; and that no evidence had been presented, on the accounting, relating to the question of damages from the infringement of either patent. The plaintiff has filed 11 exceptions to the report, and claims, as to No. 97,454, that profits have been shown amounting to \$276,667 66, with interest from June 12th, 1880; and, as to No. 101,175, that profits have been shown amounting to \$504,306 25, with interest from June 12th, 1880. The defendant has filed 6 exceptions to the report. The exceptions have been heard, and at the same time the defendant has moved the Court, on the report and the exceptions, and the evidence taken in the cause subsequent to the interlocutory decree, both before the master on the accounting, and on a motion made by the plaintiff for an attachment for a violation of the injunction, and on all the proceedings in the cause, for a reconsideration of the questions of novelty, patentability and infringement, passed upon by the Court, at the time of the entry of the interlocutory decree, in view of the evidence since introduced into the case, and in view of the decision of the Supreme Court in *Pennsylvania R. R. Co. v. Locomotive Engine Safety Truck Co.*, (110 U. S., 490,) and for a correction or setting aside of said interlocutory decree, and such other orders as may have been erroneously made in this cause.

What was said about No. 97,454, in the former decision, was this: "The specification states that the 'invention relates to the preparation and use of certain solvents of xyloidine, and

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which differ from the ordinary or known solvents of xyloidine, in that these menstrua which are employed are not, necessarily, in themselves, solvents of xyloidine, but become so by the addition of the bodies, compounds or substances herein referred to.' It also states, that the invention consists in the employment of eight different solvents. Only the second solvent is alleged to have been used by the defendant. It is thus described in the specification: 'Camphor or camphor oil, or mixture of the same, in conjunction with alcohol or spirits of wine, the same to be employed in about equal proportions.' The claim is in these words: 'The preparation and use of solvents of xyloidine, such as have been before described, so as to render xyloidine more easy of conversion into compounds containing xyloidine, which are suitable for applications in the arts and for industrial purposes.' The defendant has infringed this claim by using camphor in conjunction with alcohol, as a solvent of xyloidine. The defendant mixes ground and dried xyloidine with pulverized dry camphor, and then immerses the mixture in alcohol until the xyloidine is dissolved. It is dissolved by the joint action of the camphor and the alcohol. Neither alone is a solvent of xyloidine. It is immaterial, so far as the invention and the claim of the patent are concerned, whether the camphor and the alcohol are mixed so as to dissolve the camphor in the alcohol, and then the xyloidine is put into the solution, or whether either the alcohol or the camphor is first mixed with the xyloidine and then the third substance is added. The bringing of the three together, causing the xyloidine to be dissolved or softened, so as to be more easy of conversion or working into compounds or articles containing xyloidine, is the invention. Making use of the solvent power of camphor and alcohol, when in the presence of each other and of the xyloidine, is the essence of the invention. The use of the camphor and the alcohol in about equal proportions is not of the essence of the invention. They are stated by the patentee to be useful in those proportions. But the evidence shows that the real invention was the discovery of the fact that camphor and alcohol, when united,

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would be a solvent of xyloidine. The novelty of the invention of this solvent is attacked, but without success. The evidence is voluminous, and has been carefully considered, with the result, that the defendant has failed to show want of novelty. The prior patents adduced and examined are, the English patent to Cutting, No. 1,638, of 1854; and the English patents to Parkes, No. 2,359, of 1855, No. 2,675, of 1864, No. 1,313, of 1865, No. 1,695, of 1867, and No. 1,614, of 1868. Parkes' pamphlet, of 1867, and Gmélín's Handbook of Chemistry, of 1860, have also been considered, as well as the English patent to the plaintiff, No. 2,666, of 1867. No other anticipation than the above seems to be considered by the defendant's expert, and he does not allude to the pamphlet. Another defence relied on is, that one Parkes communicated to the plaintiff, in England, the knowledge that alcohol and camphor united were a solvent of xyloidine, and that the plaintiff never made the invention himself. On the whole evidence, the defendant has failed to establish this defence."

The Parkes patent, No. 2,359, of October 22d, 1855, says: "It is well known that a solution of gun cotton has been used principally as a photographic agent and in surgical operations, but my object is to employ collodion or its compounds for manufacturing purposes generally. The method of dissolving gun cotton being well known, I do not think it necessary to give proportions, but simply to say that when I use a thin solution I add more of either of the solvents to the gun cotton, and, if I require a stiff preparation, less of the solvent is to be used. I dissolve gun cotton, or other similar compound, in vegetable naphtha, alcohol, methylated or other ethers, or other solvents of gun cotton." By "gun cotton," it is understood was meant what is called "xyloidine" in No. 97,454.

The Parkes patent, No. 2,675, of October 28th, 1864, says, in the provisional specification: "In manufacturing compounds of gun cotton and of other vegetable substances similarly prepared, I first distil wood naphtha or alcoholic spirit over chloride of calcium, chloride of zinc, or chloride of manganese, using, by preference, the solid or fused salts.

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I employ the spirit obtained by this process, alone or combined with the light spirits from coal naphtha, or other mineral naphtha, as solvents of gun cotton or analogous compounds." The full specification says: "In manufacturing compounds of gun cotton, I employ a solvent which I prepare by distilling wood naphtha with chloride of calcium." It then describes the mode of distilling and of obtaining the solvent, and says: "The solvent thus prepared I add to the gun cotton, usually in such a proportion as to produce with it a pasty mass. * * * In place of preparing the solvent with wood naphtha, it may be similarly prepared with alcohol. * * * In place of gun cotton properly so called, other vegetable substances similarly prepared may be employed, and so in each case where in this specification the use of gun cotton is directed."

The Parkes patent, No. 1,313, of May 11th, 1865, is for "improvements in the manufacture of parkesine, or compounds of pyroxiline, and also solutions of pyroxiline, known as collodion." It is understood that "pyroxiline" is the same thing as "xyloidine." It says: "The materials now well known as parkesine consist of pyroxiline dissolved in, or softened by, solvents, and usually mixed with coloring matters, oils, and substances which control the inflammability of the pyroxiline. In manufacturing parkesine on a large scale, in accordance with the specifications of former patents granted to me, and when manipulating large masses of material, I have found considerable difficulty in the employment of the volatile solvents hitherto used. By the present invention I am enabled to produce large masses or quantities in a much better condition, in a shorter time, and with less solvent in proportion to the pyroxiline than is possible with the solvents hitherto used. According to my present invention I employ as solvents of the pyroxiline, in this manufacture, nitro-benzole, aniline and glacial acetic acid. When these solvents are employed, the parkesine can be worked freely in the air; or, these solvents may be used in combination with other solvents. I, also, according to my invention, render the ordi-

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nary volatile solvents more suitable for use by the addition of camphor. By this means, I obtain, to some extent, the same advantage as by the use of a less volatile solvent. Nitro-benzole and aniline are not rapidly volatile except at a high temperature, and this property enables me to employ them alone, or with other solvents, with very great advantage, as the dissolved pyroxiline and its combinations can be worked in rolls and by calendering or spreading machines, with great facility, not drying too rapidly, which enables me with facility to coat telegraph wire, or to make masses or sheets, or to spread the combinations on textile or other fabrics, to produce water-proof cloth for garments, or other articles, of any size or color; and the same advantage I obtain when I employ aniline, camphor, or acetic acid; and the combinations, especially those made with nitro-benzole or aniline, can be worked freely in the open air. * * * The following is the manner in which I prefer to proceed in producing parkesine according to this invention: I take 100 parts of pyroxiline and moisten it with the ordinary solvent, by preference naphtha distilled off chloride of calcium, as is described in the specification of a former patent granted to me, and as is now well understood; and I press out the excess of solvent by a hydraulic press. I then add the other solvent, in the proportion of from 10 to 50 parts of prepared nitro-benzole or aniline; or, I add 10 to 50 parts of camphor; then 150 to 200 parts of vegetable oil. I use cotton seed or castor oil by preference. This mixture I grind in rolls which are, by preference, warmed by steam admitted into them. The grinding is continued until all is well combined as a dough or paste, which will be more or less stiff, according to the quantity of solvent employed." The former patent, thus referred to, is the patent No. 2,675, which describes, as a solvent, wood naphtha distilled off chloride of calcium; and the wood naphtha, so distilled, is what is referred to in No. 1,313, as "the ordinary solvent," and as one of "the ordinary volatile solvents" which may be rendered "more suitable for use by the addition of camphor." And as, according to the language of No. 2,675, a solvent may be "similarly

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prepared" by distilling alcohol with chloride of calcium, alcohol so distilled must be regarded as an "ordinary solvent," and as one of "the ordinary volatile solvents," which is, according to the language of No. 1,313, to be rendered "more suitable for use by the addition of camphor." No. 1,313, therefore, describes the method of proceeding to be, to moisten 100 parts of pyroxiline with alcohol distilled off chloride of calcium; to press out the excess of solvent; to add 10 to 50 parts of camphor, (this being stated to be optional, instead of adding 10 to 50 parts of the prepared nitro-benzole or aniline;) to add 150 to 200 parts of vegetable oil; and to grind the mixture in rolls till it is a dough or paste.

The Parkes patent, No. 1,695, of June 8th, 1867, sets forth the mode of preparing what is called a "parkesine compound." It says: "The parkesine compound I prepare by thoroughly mixing in a vessel, with a mechanical stirrer, one part by weight of pyroxylin with six or eight parts of dehydrated or strong alcohol. The alcohol obtained by distilling the commercial alcohol off fused chloride of calcium and other similar substances is suitable. I also add in the mixing vessel cotton seed oil or castor oil, in the proportion of from five to ten per cent., by weight, of the cotton. The plastic mass of pyroxylin and solvent and oil which is obtained from the mixer is passed repeatedly through grinding rolls until perfect uniformity throughout the mass is obtained, and at the same time from two to five per cent. of resin, by preference gum copal of good quality, may be worked in. The grinding rolls should be enclosed in a casing and heated by steam. There are shelves in the casing, to enable the workmen to handle the material. The solvent which evaporates is recovered by passing the vapor through a condenser. * * * In place of using alcohol alone for the solvent of the pyroxylin, as above described, I sometimes use a mixture of equal parts of light mineral naphtha sp. gr. .850, and strong alcohol sp. gr. .825, or methylated alcohol sp. gr. .855. I use the mixed solvents, in the preparation of the plastic mass, in the proportion of five or six

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parts to one part of pyroxylin; or, I sometimes make a compound solvent of equal parts of light mineral naphtha, purified vegetable naphtha sp. gr. .840, and alcohol, and, in preparing the plastic mass, I use it in the proportion of five or six parts to one part of the pyroxylin."

No. 2,359 distinctly states that gun cotton is dissolved in alcohol. Nothing is said about distilling or preparing the alcohol, or dehydrating it. In No. 2,675, alcoholic spirit is described as distilled over chloride of calcium, and then employed, either alone or combined with the light spirits from coal naphtha or other mineral naphtha, as a solvent of gun cotton. No. 1,313 describes the use, as a solvent of pyroxiline, of alcohol distilled off chloride of calcium, combined with camphor, the alcohol so distilled being called an ordinary volatile solvent. In No. 1,695, dehydrated or strong alcohol, obtained by distilling commercial alcohol off fused chloride of calcium, is described as a solvent of pyroxylin, either alone, or mixed with light mineral naphtha.

In No. 1,313, the pyroxiline is moistened with the ordinary solvent, and then the camphor and oil are added, and the mixture is ground. In the defendant's manufacture, the xyloidine and the dry camphor are mixed, and then ground together, and the ground mixture is steeped in alcohol. No. 97,454 claims broadly the use of camphor in conjunction with alcohol, without reference to any order of manipulation. It covers equally the liquid resulting from the combination of alcohol and camphor, to which the xyloidine is added, and the mixing of the xyloidine first with either the alcohol or the camphor, and the addition of the other ingredient.

In No. 1,313, the ordinary volatile solvent, alcohol distilled off chloride of calcium, is used to moisten the pyroxiline, and the camphor is added, which, the patent says, has the effect to render such ordinary volatile solvent more suitable for use. The camphor is stated to be used in place of prepared nitro-benzole or aniline, which is a solvent. The camphor, therefore, co-operates with the alcohol, and the com-

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bination acts as a solvent. In No. 97,454 it is said that the solvents of that patent "differ from the ordinary known solvents of xyloidine, in that these menstrua which are employed are not, necessarily, in themselves, solvents of xyloidine, but become so by the addition of the bodies, compounds or substances herein referred to." In the former decision it was said that the invention of Spill was "the discovery of the fact that camphor and alcohol, when united, would be a solvent of xyloidine." It was also said that the defendant dissolved its xyloidine "by the joint action of the camphor and the alcohol;" and that "neither alone is a solvent of xyloidine." Whether either alone is or is not a solvent of xyloidine, is of no importance. The defendant employs as a solvent the combination of alcohol and camphor. That is what No. 97,454 claims—employing as a solvent camphor in conjunction with alcohol. What No. 97,454 says is, that the menstrua employed are not "necessarily, in themselves," solvents of xyloidine. Yet, if what is employed is essentially a combination of spirits of wine and camphor, it is an infringement of No. 97,454; and if what was essentially a combination of spirits of wine and camphor was before described as a solvent, No. 97,454 is not valid.

The only point remaining is as to the use in No. 1,313, in connection with camphor, of alcohol distilled off chloride of calcium. No. 1,695 shows that commercial alcohol so distilled is nothing but dehydrated alcohol, alcohol deprived of its water, alcohol made strong, and that, alone, it is a solvent of pyroxylin. Commercial alcohol has more or less water. The water acts no part as a solvent. The object is to get rid of the water and avail of the spirit. It is the spirit which is effective. To dehydrate the commercial alcohol, or deprive it of its water, or make it strong alcohol, or absolute alcohol, which is done by distilling it off chloride of calcium, is only to concentrate it, and thus entitle it the better to be called alcohol or spirits of wine. When distilled, it is yet alcohol. When not distilled it is called alcohol. When strong, made absolute, freed from water, concentrated, it was, and is, of

itself, a solvent of xyloidine; and, in that state, it was, before Spill's invention, described as used with camphor, as a solvent of xyloidine. The only question was, as to the strength necessary for the alcohol—as to how much water it might contain, and yet be a solvent with the camphor. There could be no invention in using alcohol of less and less strength, until a point was reached, as to weakness, beyond which it would not answer to go. Spill gives the date of his invention as the early part of 1869. Before that the world was informed that dehydrated or strong alcohol was, of itself, a solvent of pyroxylin, and was instructed to mix it with camphor, as such solvent. It must be strong enough in spirits to do its work. Using it of less strength, and yet of sufficient strength, was no invention. To use dehydrated alcohol with camphor would infringe No. 97,454, and yet it would be to use only what was before described. Under the Constitution, a patent can be granted only to an inventor, and, under the statute, the thing for which a patent may be granted must not only be new and useful, but it must amount to an invention or discovery. "A mere carrying forward, or new or more extended application, of the original thought, a change only in form, proportions or degree, the substitution of equivalents, doing substantially the same thing, in the same way, by substantially the same means, with better results, is not such invention as will sustain a patent." (*Smith v. Nichols*, 21 Wall., 112, 119.)

Being satisfied that due weight was not given to these considerations, in connection with the state of the art, as shown, at the hearing which resulted in the interlocutory decree, and that that decree ought not to have been made, no other result can be reached than that effect must be given to this conclusion, and No. 97,454 be held invalid, so far as it claims the preparation and use of camphor in conjunction with alcohol or spirits of wine, as a solvent of xyloidine.

As to No. 101,175, the former decision said: "There are five claims in the patent. The second alone is alleged to have been infringed. The specification says: 'The second part of my invention relates to the bleaching of xyloidine, and is as

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follows : When it is desired to bleach or whiten the xyloidine, I bleach it directly after the removal of the acids, and before removing it from the vat. This I do by any of the well known means, preferring a solution of chlorine, or a solution of chloride of lime or soda, which I add to the xyloidine, making use of alternate stirrings and rest, for a sufficient time, until the xyloidine is whitened. The solution is again drained off, and the xyloidine is repeatedly washed with water, in order to remove any excess of bleaching agents or any residue from such agents, when it will be found to be ready to be submitted to pressure in order to free the same from water, and may then be opened out, so as to prepare it for drying, dissolving, or other purposes.' The second claim is in these words : 'The process of bleaching xyloidine in the manner herein specified.' That portion of the specification which precedes the statement of the second part of the invention relates to the treatment of vegetable fibre or lignine with acids, to convert it into xyloidine and render it soluble in suitable solvents. The fibre is intimately mixed with the acids by appropriate means, then the acids are strained and pressed from the fibre, which is now xyloidine, and it is subjected to a washing and stirring with water until it is nearly or quite free from acids, and the water is then drained off. The washing is done in a washing vat. The bleaching, as before stated, is done directly after the removal of the acids, and before the xyloidine is removed from the vat. The evidence shows that the real invention of the plaintiff, in this regard, was to bleach xyloidine by ordinary bleaching agents, directly after the converting acids had been washed out of it, and before anything had been mixed with it which might interfere with the action of the bleaching agents. This is, fairly, the sense of the specification. Whether the bleaching is done in the washing vat or not, or in a solution of the ordinary bleaching agent, or by such agent not in a solution, are immaterial matters. The essential discovery was, that an ordinary and well known bleaching agent, of the character of chlorine, or chloride of lime, or chloride of soda, if applied to xyloidine, when it had be-

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come such and had been freed from the converting acids, and while it remained in that state, would act upon it to bleach it. The defendant treats paper with acids to make xyloidine, then washes out the acids, then grinds it, and, while it is being ground, applies bleaching powders to it. The evidence is satisfactory, that one of such bleaching powders is permanganate of potash, and that it was a well known and ordinary bleaching agent at the time of the plaintiff's invention. Therefore, infringement is established. It is contended, for the defendant, that the claim in regard to bleaching does not claim a patentable invention, because it is merely the use, to bleach xyloidine, of what had before been used to bleach fibrous material not converted into xyloidine. The true view is well expressed by Professor Seeley, the plaintiff's expert. The defendant's expert, Mr. Edward S. Renwick, had cited four English patents, those to Martin, No. 7, of 1864, to Reeves, No. 2,797, of 1860, to Collyer, No. 550, of 1859, and to Reeves, No. 3,293, of 1866, as describing the treatment of vegetable fibre with a solution of chloride of lime or of soda, substantially as the plaintiff's patent describes xyloidine as being treated with a solution of chloride of lime or of soda. Professor Seeley says: 'The patents referred to by Mr. Renwick cover inventions relating to bleaching, by means of ordinary bleaching agencies, the ordinary fibrous substances which are used for clothing, paper stock, &c. I do not find in them anything which has more bearing upon the novelty of Spill's invention than what might be included in the matter which Spill regards and defines as old and well known. Previous to Spill's time, the ordinary bleaching materials and methods were only applied to a peculiar class of substances, namely, those substances of fibrous character which were useful mainly by reason of that fibrous character. Spill's invention brings the utility of bleaching upon a new kind of material, and brings it where it was very desirable, but where it was supposed to be impracticable. It is true that pyroxiline' (xyloidine) 'has a fibrous structure, but this fibrous structure is not any essential or useful property in

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it. In fact, in this art, pyroxiline does not become useful until the fibrous structure is destroyed. Pyroxiline is not useful for any of the purposes to which the materials formerly bleached were applied. Pyroxiline is very different, in chemical character and composition, from the old bleachable materials. If pyroxiline had not the fibrous structure, probably the question of invention in this case would not have arisen, for then it would have appeared plainly, that the case would have been similar to that of (suppose) bleaching charcoal by ordinary bleaching agents. In advance of experiments, the bleaching of a substance like pyroxiline would seem impracticable, almost incredible. The theory of ordinary bleaching is, that the coloring matter of goods to be bleached is of a complicated and unstable character, and is destroyed by the powerful chemical action of the bleaching agents, chlorine, oxygen, &c. Inasmuch as pyroxiline, in its manufacture, has been exposed to the action of some of the most powerful chemical agents which are known, it is unreasonable to suppose that any of the unstable coloring matter could be left in it. The bleaching of pyroxiline has often been proposed and attempted; it was especially desirable in this art, but it is my opinion that a chemist would exhaust all other theories before he would think of ordinary bleaching agents for the purpose. The subject had come up in my mind several times before Spill's invention, and I was unwilling to credit the efficacy of his plans until they were actually demonstrated to me. I know of very few inventions where so novel and useful results have been obtained by such simple and unlooked-for methods.' There is no evidence to countervail this view."

The decision in *Pennsylvania R. R. Co. v. Locomotive Engine Safety Truck Co.*, (110 U. S., 490,) makes it impossible to sustain the view heretofore announced as to No. 101,175. The ruling in that case is, that "the application of an old process or machine to a similar or analogous subject, with no change in the manner of application and no result substantially distinct in its nature, will not sustain a patent, even

if the new form of result has not before been contemplated."

In the Martin patent, No. 7, of 1864, fabrics composed partly of vegetable and partly of animal material, and other fabrics and materials, designed to be used in making paper, are boiled with lime and soda or potash, in a rotating boiler provided with beaters, and the cleansed rags are then bleached in the boiler by an "ordinary bleaching liquid, consisting of a solution of chloride of lime or soda, with a proportion of sulphuric acid."

In the Reeves patent, No. 2,797, of 1860, jute and other fibres of a similar nature, intended to be made into pulp for paper, are boiled in an alkali, then treated with chloride of soda or lime, under heat, then immersed in a bath of chloride of lime, of moderate strength, to which is added a small quantity of diluted sulphuric or hydrochloric acid, then boiled in a weak caustic alkaline solution, whereby a large quantity of coloring matter is extracted, then washed, and then treated in a solution of chloride of soda or lime, or both together, so that a perfect white will be the result.

In the Collyer patent, No. 550, of 1859, straw, flax and other materials, to be used in making paper, are boiled in caustic alkali, then washed, and then bleached in a chloride of lime solution.

In the Reeves and Muschamp patent, No. 3,293, of 1866, vegetable fibres or common rags, to be made into paper for explosive purposes, are boiled in caustic alkali and washed, and then a solution of chloride of lime is employed to disintegrate and bleach them, a small quantity of diluted sulphuric or other acid being added to the chloride of lime.

The validity of No. 101,175 was rested by the plaintiff, at the original hearing, and is now rested, on this alone, as a claim of invention—that he discovered that xyloidine, or soluble gun cotton, made by the use of substances so powerful as nitric and sulphuric acids, could be bleached by ordinary bleaching materials. The view urged and admitted as sustaining the patent was, that no one could or would have be-

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lieved, in advance, that it was possible. But the old process of bleaching by ordinary bleaching agents was applied to vegetable fibres, with no change in the manner of application, and with the same distinct result of bleaching. The only difference was, that the product was bleached vegetable fibre in the shape of converted gun cotton, instead of bleached vegetable fibre not so converted. The fact that bleached gun cotton had not before been known or contemplated did not make the bleaching of it in that way a patentable invention, in view of the state of the art. What was done was to bleach, by a process which acted objectively on the material and left it the same thing as before bleaching, but in a bleached state. The bleaching agent did not form with the material a new chemical product. No. 101,175 says, that the bleaching solution, after the xyloidine is whitened, is drained off, and the bleached article is repeatedly washed with water, to remove any excess of bleaching agents, or any residue from such agents. It also states, that the material to be used to make "soluble gun cotton or xyloidine" is "cotton or other vegetable fibres or lignine, either in their normal condition, or after they have passed through any manufacturing process, or the refuse of the same, or the ordinary rags of commerce, either in a white, dyed or colored condition."

In the case of *Pennsylvania R. R. Co. v. Locomotive Engine Safety Truck Co.*, the decision of the Circuit Court was reversed on the question of patentability, and the rules laid down show that under it, and the cases which the opinion cites and approves, the decision in the present case as to No. 101,175, ought to have been that claim 2 set forth no patentable invention.

Within the principle applied in *Wooster v. Handy*, (*ante*, p. 307,) this court has the power and it is its duty to dismiss, with costs, the bill in this case, and it is so ordered.

B. F. Thurston and H. M. Ruggles, for the plaintiff.

W. D. Shipman, F. H. Betts, H. Baldwin, Jr., and E. L. Hamilton, for the defendant.

AFTERWARDS, the plaintiff moved for leave to file a supplemental bill in the nature of a bill of review, which was denied November 6th, 1884.

BLATCHFORD, J. Since the announcement of the decision of the Court in this case, (*ante*, p. 441.) dismissing the bill of complaint, and before the entering of any formal decree to that effect, the plaintiff has made a motion for leave to file a supplemental bill of complaint in the nature of a bill of review. The motion is founded on a petition which purports to be the petition of the plaintiff, by his solicitor, and is not signed or sworn to by the plaintiff, or any agent or attorney in fact of his, but is signed and sworn to by the solicitor, and is supplemented by an affidavit made by the solicitor, stating that the reason why the petition was not signed and verified by the plaintiff was because the plaintiff is in Europe, and has been there for several years last past, and for the further reason, that the facts and statements set forth in the petition are within the knowledge of the solicitor.

The petition sets forth, that, since the decision of August 21st, 1884, the petitioner has discovered new matter of consequence in the cause, particularly, that John W. Hyatt, Jr., and David Blake obtained letters patent of the United States, No. 89,582, on the 4th of May, 1869, a printed copy of the specification of which is annexed to the petition; that the defendant, as assignee of I. Smith Hyatt and John W. Hyatt, (who is the same person who is called John W. Hyatt, Jr., in No. 89,582,) obtained letters patent of the United States, No. 156,352, on the 27th of October, 1874, a printed copy of the specification of which is annexed to the petition; that it appears, by No. 89,582, that, in making compounds containing soluble gun cotton, the gun cotton is dissolved "in a mixture of equal parts of alcohol and ether," thereby showing that alcohol alone is not a solvent of soluble gun cotton; that it appears by No. 156,352, that the object of the alleged invention "is to overcome certain objections which are involved

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in the use of liquid solvents, as ordinarily employed in the manufacture of solidified collodion," or celluloid; that the specification says: "Heretofore, liquid solvents have been used in dissolving pyroxyline, by first preparing the solvent—for instance, ether and alcohol, nitro-benzole, &c.—and then saturating the pyroxyline with the solvents;" that it also says: "Our present improvement consists in transforming pyroxyline into solidified collodion or 'celluloid' (see trademark No. 1,102, registered January 14, 1873,) by using a liquid instead of a solid solvent, which liquid solvent, like the solid, is latent at ordinary temperatures, but becomes active, and dissolves the pyroxyline, upon the application of heat. The following is a description of our improved process: We make a weak solution of camphor in alcohol, the proportions being, by weight, one part of camphor to eight parts of alcohol. This solution of camphor is not a solvent of pyroxyline at ordinary temperatures, and we therefore term it a latent liquid solvent, but it becomes an active solvent at an elevated temperature. There being differences, however, in the solubility of different grades of pyroxyline, a corresponding change in the strength of the solution of camphor becomes necessary, which may readily be determined by experiment;" that the claims of No. 156,352 are: "1. The process herein described, of manufacturing solidified collodion, by mixing pyroxyline with a latent liquid solvent, which becomes active only upon the application of heat, as and for the purposes set forth. 2. In the manufacture of solidified collodion, the process of making a homogeneous mass by mixing pyroxyline with one (1) part of camphor and eight (8) parts of alcohol, which forms a solvent that will remain latent at ordinary temperatures, and becomes active upon the application of heat, substantially as described;" that the plaintiff, understanding, from the opinion of the Court filed in May, 1880, (18 *Blatchf. C. C. R.*, 190,) that it had been satisfactorily established, by the evidence in the cause, that, in the art to which the invention of the plaintiff, as set forth in his patent No. 97,454, relates, alcohol is not a solvent of pyroxyline, and was not an ordinary

volatile solvent of soluble gun cotton, and that the evidence had been carefully considered, and the prior patents adduced and examined were the patent to Cutting, No. 1,668, of 1854, in which the gun cotton is said to be washed in strong alcohol before it is dissolved in a mixture of ten parts of ether and six parts of alcohol, and also all the patents of Parkes, did not suppose that it was necessary he should make further search for evidence to establish the fact that alcohol alone and camphor alone are not solvents, at ordinary temperatures, of the soluble pyroxyline which is suitable for use in compounds containing xyloidine; that, therefore, he did not pursue the search in the Patent Office and elsewhere, for evidence upon that point, but since the hearing in July, 1884, of the defendant's motion which resulted in the decision of August 21st, 1884, he has caused an examination of patents to be made, and has found the before-named patents, containing statements as to solvents of pyroxyline, made by parties connected with the defendant; that, taken in connection with the proofs in the cause as they stood at the final hearing, this evidence establishes the fact that alcohol was not, at the date of either of Parkes' patents, a solvent of the pyroxyline useful in the arts, was not one of the "ordinary volatile solvents" spoken of by Parkes, and would not dissolve pyroxyline; that the materiality of such evidence consists in showing that alcohol and ether are neither alone solvents, and that alcohol, even when mixed with one eighth of its weight of camphor, does not become a solvent; that the same word, "alcohol," is employed in all these patents, to designate the same substance, namely, that substance derived from grain and fruits by distillation, and which is not known to chemists or other persons as a solvent of any useful form of pyroxyline; that, if that was true, when the defendant said, in 1874, that a weak solution of camphor, of one part, by weight, of camphor, and eight parts, by weight, of alcohol, is not a solvent of the pyroxyline used in making solid collodion, it was equally true in 1865, and prior to that date, when the art was in its infancy; that such statement of fact

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is an admission of record, by the defendant, of a material fact in the cause; and that the plaintiff should have the benefit of the same and of the other patents referred to, as evidence in his behalf. The prayer of the petition is for leave to file a supplemental bill in the nature of a bill of review.

To this petition the defendant interposed a demurrer, assigning for cause, (1) that it does not appear, by the petition, that the petitioner could not, with reasonable diligence, have discovered the alleged new matters set forth therein, prior to the hearing and decision of this case, and could not have duly presented the same to the attention of the Court at a prior stage of the case; (2) that it does not appear, by inspection of the petition, and of the copies of the specifications thereto annexed, that the alleged new matter is, in any way, material or controlling upon the merits of this case; (3) that the petition is not verified by the plaintiff, or by any one authorized to act for him in that behalf, but by a solicitor only; (4) that the petition does not disclose any matter of equity whereon or whereby the prayer of the petition should be granted.

(1.) The first cause of demurrer is well assigned. The cases of *Smith v. Babcock*, (3 *Sumner*, 583,) *Baker v. Whiting*, (1 *Story*, 218,) *Walden v. Bodley*, (14 *Peters*, 156,) *India Rubber Comb Co. v. Phelps*, (8 *Blatchf. C. C. R.*, 85,) *Hitchcock v. Tremaine*, (9 *Id.*, 550,) *Prevost v. Gratz*, (*Peters' C. C. R.*, 364,) *Livingston v. Hubbs*, (3 *Johns. Ch. R.*, 124,) *Ruggles v. Eddy*, (11 *Blatchf. C. C. R.*, 564,) *Webster Loom Co. v. Higgins*, (13 *Id.*, 349,) *De Florez v. Raynolds*, (17 *Blatchf. C. C. R.*, 436,) and *Page v. Holmes Burglar Alarm Telegraph Co.*, (18 *Blatchf. C. C. R.*, 118,) are authorities holding, that, in a petition like the present one, it must be shown that the petitioner could not, with reasonable diligence, have obtained, prior to the former hearing, the testimony which he now seeks to adduce. All that the present petition avers, in that connection, is, that the new matter has been discovered since the last decision; and that

the plaintiff understood it to be satisfactorily established, from the opinion of the Court on the first decision, (which was one sustaining the plaintiff's patent, while the last decision dismissed the bill, on the merits,) that "alcohol is not a solvent of pyroxyline, and was not an ordinary volatile solvent of soluble gun cotton," and did not suppose it was necessary he should make further search to establish the fact "that alcohol alone and camphor alone are not solvents, at ordinary temperatures, of the soluble pyroxyline which is suitable for use in compounds containing xyloidine;" and that, therefore, he did not pursue the search for evidence upon that point, in the Patent Office and elsewhere, but had done so since the last hearing and had found the two patents referred to: This is an insufficient showing, under the cases above cited.

2. The new matter is not material. In the first decision, it was said, as to camphor and alcohol, that "neither alone is a solvent of xyloidine." This is not a statement made in the specification of the plaintiff's patent. The claim of that patent covers eight different solvents of xyloidine, of which the use of camphor and alcohol conjointly is one. As to all of the solvents claimed, the specification says, that the "invention relates to the preparation and use of certain solvents of xyloidine, and which differ from the ordinary or known solvents of xyloidine, in that these menstrua which are employed are not, necessarily, in themselves, solvents of xyloidine, but become so by the addition of the bodies, compounds or substances herein referred to." This statement, as applied to alcohol, is a statement, that alcohol may be or may not be, in itself, a solvent of xyloidine, but that it is unimportant whether it is or is not, the invention being the compound, or mixture, or joint action, of camphor and alcohol. Therefore, it was said, in the decision, that "whether either alone is or is not a solvent of xyloidine is of no importance." The patent covers a combination of camphor and alcohol. The infringement in question is a use of that combination. The anticipatory description to be looked for is a description of the use of that combination.

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Parkes, in No. 2,359, said that he dissolved gun cotton in alcohol. It is sufficient that he said he did, whether he did or not. In No. 2,675, he said that he distilled alcohol over chloride of calcium, and used it as a solvent of gun cotton. It is sufficient that he said he did, whether he did or not. In No. 1,313, he says he takes the solvent of No. 2,675, and moistens pyroxyline with it and then adds camphor. Alcohol distilled over chloride of calcium is clearly mentioned in No. 1,313, as an "ordinary solvent," and is "one of the ordinary volatile solvents" embraced in this statement in No. 1,313: "I, also, according to my invention, render the ordinary volatile solvents more suitable for use by the addition of camphor." Whether alcohol so distilled was or is an ordinary solvent, or a solvent at all, by itself, of pyroxyline, is of no importance, provided the description is that alcohol so distilled and camphor are conjointly used as a solvent of pyroxyline. Such is the description in No. 1,313. The ground is so fully gone over in the opinion on the last decision that it is not necessary to repeat here the views there announced.

Moreover, the new evidence sought to be introduced is irrelevant to prove the point to which it is intended to be directed, namely, that alcohol alone or camphor alone was not, at the date of the plaintiff's patent, understood to be a solvent of pyroxyline; because, No. 89,582, though of a date earlier than the plaintiff's patent, shows nothing except that the patentee in it dissolves gun cotton in a mixture of alcohol and ether; and No. 156,352 is of a date nearly five years later than the plaintiff's patent, and says no more than that ether and alcohol are a liquid solvent ordinarily employed in 1874, in dissolving pyroxyline, and that a weak solution of camphor in alcohol will not be an active solvent, at ordinary temperatures.

Without passing on any other points raised by the demurrer, it is sustained and the petition is dismissed, with costs.

H. M. Ruggles and E. M. Felt, for the plaintiff.

F. H. Betts and E. L. Hamilton, for the defendant.

Rogers v. Bowerman.

WILLIAM C. ROGERS AND OTHERS

vs.

BENJAMIN F. BOWERMAN AND OTHERS.

In an action at law, where it was far from clear that the plaintiffs were entitled to recover, and the Court had, with grave doubt, directed a verdict for them for over \$5,000, an application by them to remit part of the verdict, so as to reduce it below \$5,000, and thus prevent a review by the Supreme Court, on a writ of error, was refused.

(Before WALLACE, J., Southern District of New York, August 22d, 1884.)

WALLACE, J. The plaintiffs ask leave to remit part of the amount for which the verdict in this case, by direction of the Court, was rendered in their favor. The result, if such a reduction of the judgment to be entered is permitted, would be to reduce the judgment below the sum of \$5,000, and thereby preclude the defendants from a review, by writ of error, in the Supreme Court. Undoubtedly, it is competent for the trial Court, in the exercise of judicial discretion, to allow such a reduction to be made; but such a discretion should be very carefully and sparingly exercised. Certainly, this is not a case where the Court should willingly deprive the defendants of an opportunity to review the decision. As is said in *Thompson v. Butler*, (95 U. S., 694, 696,) "if the object of the reduction is to deprive an appellate Court of jurisdiction in a meritorious case, it is to be presumed the trial Court will not allow it to be done." It is far from clear that the plaintiffs were entitled to recover, and a verdict was directed for them with grave doubt as to the correctness of the conclusions reached by the Court. It is a peculiarly meritorious case for the consideration of the appellate Court.

Motion denied.

Everett P. Wheeler, for the plaintiffs.

Edmund Coffin, Jr., for the defendants.

Hayes v. Bickelhaupt.

GEORGE HAYES

vs.

GEORGE BICKELHOUP, SENIOR. IN EQUITY.

Claims 1 and 5 of letters patent, No. 170,852, granted to George Hayes, December 7th, 1875, for an improvement in ventilating louvers, are invalid.

Claim 1 is a claim for a louver, consisting of the combination of an outer reticulated covering, with curved slabs, called gutters, within; and claim 5 is for the gutters themselves. The covering and gutters together form an aggregation, and not a patentable combination, and there was no patentable invention in putting the two together for uses for which each was before well known separately. The use of the flanges was only the result of good workmanship.

(Before WHEELER, J., Southern District of New York, August 25th, 1884.)

WHEELER, J. This suit is brought upon letters patent, No. 170,852, dated December 7th, 1875, and issued to the orator, for an improvement in ventilating louvers. There are five claims, the 1st and 5th of which are alleged to be infringed. A louver appears to be an opening in buildings crossed by a series of slanting slats to exclude rain and snow, and admit air. The patent describes a louver with an outer reticulated covering, and curved slats, called gutters, within, having flanges at the upper edges extending upwards, and at the lower edges extending downwards, both serving to stiffen the gutters, and the lower one for an attachment for the reticulated covering. The first claim is for the combination of the covering with the gutters, and the fifth is for the gutters themselves. These gutters are shown slanting, and operating to shed rain or snow, in the same manner as the slanting slats. The reticulated covering operates as a screen, precisely as it would if there were no slats. Neither operates any differently, or accomplishes any result, in connection with the other, different, from what it would if the other was not there. They appear to form a mere aggregation, and not a patentable combination. (*Pickering v. McCullough*, 104 U. S., 310; *Double*

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Pointed Tack Co. v. Two Rivers Manfg Co., 109 U. S., 117.) Further, slanting slats performing the same office as these were a part of common knowledge; their existence is assumed in the patent, as a known part of a louver, on which the invention was set up as an improvement. A screen like the reticulated covering was also well known. There would not appear to be any patentable invention in putting the two to uses together for which each was before well known separately.

The flanges to the gutters, for stiffening them, were merely such additions as would be supplied by good workmanship, when needed. They were not new for that purpose. And the use of the flange shape for attaching the reticulated covering would appear to be very obvious.

These claims appear to be without sufficient invention to uphold them.

Let there be a decree dismissing the bill of complaint, with costs.

J. H. Whitelegge, for the plaintiff.

Arthur V. Briesen, for the defendant.

HENRY S. MARLOR

vs.

THE TEXAS AND PACIFIC RAILROAD COMPANY.

A railroad company issued bonds, by each of which it promised to pay the sum named in it, on a specified day, with interest payable annually, as provided in a mortgage on land, and also on the net income from operating a road of the company. The bond contained this clause: "In case such net earnings shall not, in any one year, be sufficient to enable the company to pay 7 *per cent.* interest on the outstanding bonds, then scrip may, at the option of the company, be issued for the interest:" Held, that the bond contained an abso-

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lute promise to pay the interest in money or in scrip; in money, if the interest should be earned; in scrip, at the election of the company, if it should not be earned.

The election not having been exercised by the company, before the interest became due, it became payable in money.

Presentment of the bonds for payment of interest was not a pre-requisite to a right of action for the interest.

An announcement by the defendant that it was not prepared to pay the interest either in money or in scrip was a waiver of the necessity of presentment.

(Before WALLACE, J., Southern District of New York, August 27th, 1884.)

WALLACE, J. This case has been tried before the Court without a jury. The plaintiff is the owner of 150 bonds of the defendant, for \$1,000 each, and sues to recover two instalments of interest thereon, one of \$10,500, payable July 1st, 1882, and one of \$10,500, payable July 1st, 1883. The bonds are part of an issue of 8,857 bonds, created by the defendant in 1875, and known as "Income and Land Grant bonds." They are secured by a mortgage, which is a first lien on 7,600,000 acres of land of the defendant, and also upon the net income arising from operating the defendant's lines of railroad east of Fort Worth, after paying interest on prior mortgages thereon.

By the terms of the bond, the defendant acknowledges itself to be indebted to the holder in the sum of \$1,000, "which sum the company promises to pay to — or assigns, at the office of the company, in the city of New York, on the 1st day of January, 1915, with interest thereon at the rate of 7 *per cent. per annum*, payable annually, on the 1st day of July of each year, as provided in the mortgage hereinafter mentioned." After reciting that the payment of the bond is secured by a first mortgage, of even date therewith, upon the lands of the company, and, also, upon the net income of the company derived from operating its railway east of Fort Worth, the bond contains the following condition: "In case such net earnings shall not, in any one year, be sufficient to enable the company to pay 7 *per cent.* interest on the outstanding bonds, then scrip may, at the option of the company, be issued for the interest; such scrip to be received at par

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and interest, the same as money, in payment for any of the company's lands, at the ordinary schedule price, or it may be converted into capital stock of the company, when presented, in amounts of \$100, or its multiple." The mortgage is silent respecting payment of interest or principal, except that it authorizes the trustees to sell the mortgaged lands if default is made in the principal sum at maturity of the bond, and apply the proceeds to satisfy the amount due.

The rights and obligations of the parties, in an action upon these bonds, were incidentally considered by this Court, upon a motion, in this case, to strike out certain parts of the answer of the defendant. (19 *Fed. Rep.*, 867.) Upon that motion, it was intimated that the plaintiff was entitled to recover the instalments of interest unpaid, unless the defendant could show that it had not made net earnings sufficient, and had exercised its option to issue scrip in lieu of paying interest in money. It was not intended, upon an interlocutory motion, to foreclose the defendant from contesting fully its liability upon the trial of the action; and, accordingly, it has been strenuously insisted, for the defendant, that the interest is not payable in money; that the bond is an income bond, on which interest accumulates, but is not payable until earned; and, if not earned, the bond is satisfied by payment in scrip.

The elaborate argument upon the trial has not changed the opinion previously entertained, that there is nothing in the language of the mortgage which controls or qualifies the absolute promise, in the bond, to pay interest in money or in scrip. The mortgage deals only with the subject of the security which is to belong to the bondholders as collateral to the obligation, and with their auxiliary rights and remedies for enforcing the promise in the bond. If the bonds are to bear the construction claimed by the defendant, the bondholders, for forty years, instead of being creditors of the company, are practically only preferred stockholders, with the privilege of exchanging their stock for the lands of the company. It would be a misnomer to call such instruments bonds. There is a plain promise to pay interest annually, and nothing to

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lead a purchaser to suppose that he is not to have his interest, or scrip instead, at the election of the defendant, if the net earnings of the railway are not sufficient to pay the interest. If the interest is earned, the holder cannot be put off with scrip. If it is not earned, he may be, at the election of the company. The plaintiff was entitled to his money or the scrip, its substitute, on the day at which, by the terms of the bond, the defendant was to pay the interest or exercise its alternative. It is elementary, that, when a promise is in the alternative, to pay in money or in some other medium of payment, the promisor has an election to pay either in money or in the equivalent, and, after the day of payment has elapsed, without payment, the right of election on the part of the promisor is gone, and the promisee is entitled to payment in money. For various illustrations, see *McNitt v. Clark*, (7 Johns., 465;) *Gilbert v. Danaforth*, (2 Seld., 585;) *Stephens v. Howe*, (2 J. & Sp., 133;) *Stewart v. Donelly*, (4 Yerg., 177;) *Choice v. Moseley*, (1 Bailey, 136;) *Butcher v. Carlile*, (12 Gratt., 520;) *Church v. Feterow*, (2 Penrose & W., 301;) *Trowbridge v. Holcomb*, (4 Ohio St., 38;) *Perry v. Smith*, (22 Vt., 301;) *Mettler v. Moore*, (1 Blackf., 342.)

The option in the bond here was evidently intended for the benefit of the defendant, and to enable it to substitute scrip for money, in case its net earnings, or other resources, were not such as to permit it providently to pay in money. There is no reservation in terms, or by implication, of a right to exercise the option after the day of payment, and, that day having elapsed without an election by the defendant, the bondholders are entitled to be paid in money.

Upon the trial, it appeared that there was no formal presentment of the bonds in suit, for payment of interest, on the 1st day of July, 1882, or on the 1st day of July, 1883, but it was shown, that, shortly after each of those days, the treasurer of the defendant, at the defendant's office, notified holders of the bonds, that the defendant was not prepared to pay the interest, as the earnings of the railway had not been sufficient, and that no action had been taken by the defendant in

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reference to the issue of scrip. Before the commencement of this suit, induced by the suggestion that suits were about to be brought to recover the interest on the bonds, and on or about the 12th day of October, 1883, the directors of the defendant adopted a resolution, providing for paying the interest in scrip. Notice of this action on the part of the defendant was given to the plaintiff, and to the bondholders generally, by publication. It is insisted, for the defendant, that the defendant is not in default until a demand by the plaintiff, and, no valid demand having been made, the plaintiff should fail in his action. Neither presentment or demand is a prerequisite to a right of action for the recovery of the interest. Neither is necessary when there is a promise to make payment at a specified time. It devolves upon the debtor to prove payment or readiness to pay. There is no distinction, in this respect, between notes and negotiable bonds; (*Savannah & Memphis R. R. Co. v. Lancaster*, 62 Ala., 555; *Phila. & Balt. R. R. Co. v. Johnson*, 54 Penn. St., 127;) and the rule applies also to notes payable in specific articles. (*Elkins v. Parkhurst*, 17 Vt., 105; *Wiley v. Shoemaker*, 2 Green, (Iowa,) 205.)

If the defendant had been prepared to deliver the scrip when the interest matured, it would have complied with its agreement and been absolved from liability. The law does not usually require the doing of a vain thing, and, after the defendant had announced that it could not pay the interest and was not prepared to issue the scrip, it would have been a nugatory and perfunctory act, on the part of the plaintiff, when he was entitled absolutely to his money, to make a formal presentment of his bonds, and a formal demand of payment. .

Judgment is ordered for the plaintiff, for \$21,000, with interest on \$10,500 from July 1st, 1882, and on \$10,500 from July 1st, 1883.

John R. Dos Passos, for the plaintiff.

John F. Dillon, for the defendants.

WILLIAM REED

vs.

THE ATLANTIC AND PACIFIC RAILROAD COMPANY.

Where the Circuit Court for the District of Massachusetts had decided, in a suit by one corporation against another, to recover dividends due to the stockholders of the former, under a lease to the latter, that the right of action was in the former, and not in its stockholders, this Court, in a suit by one of such stockholders, against the latter, to recover part of the same dividends, held that the prior decision should be followed.

(Before WALLACE, J., Southern District of New York, August 27th, 1884.)

WALLACE, J. I should incline to the opinion, were it not for the decision of the Circuit Court for the District of Massachusetts, that the plaintiff, as one of the stockholders of the Pacific Railroad, could maintain this action, and that its directors were not his agents or the agents of the stockholders generally, or of the corporation, in accepting a surrender of the lease made by the corporation to the defendant. It would seem that, by the lease of all its property to the defendant, for 999 years, with a power to mortgage, the Pacific Railroad practically abdicated all its functions, dissolved its relations with its stockholders, and constituted its stockholders creditors of the defendant. By the terms of the lease, it was to maintain its corporate organization in the interests of the defendant, and was also to retain sufficient vitality to re-enter and take possession of the demised property, in case the interest to its bondholders, or dividends to its stockholders, were not paid by the defendant according to the covenants. For all practical purposes, the corporation was as defunct as anything short of a judgment of dissolution could make it; and this was the result contemplated by all the parties to the lease. If its directors had accepted a surrender under circumstances which, in any conceivable way, could have enured to the in-

terests of its stockholders or creditors, their action might be deemed as equivalent to exercising the power of re-entry.

But, in the suit brought in the name of the corporation, against the defendant, to recover, among other things, the dividends due stockholders under the lease, it was decided, by a Court of co-ordinate jurisdiction with this, that the cause of action was in the corporation, and not in the individual stockholders. (*Pacific R. R. v. Atlantic & Pacific R. R. Co.*, 20 *Fed. Rep.*, 277.) That decision is entitled to great respect. Upon the case in the form in which it was there presented, the conclusion reached by the Court seems reasonable and sound. It is certainly desirable that the rights of all the stockholders, and the liability of the defendant to them, be settled in one controversy; and it may well be considered that the corporation retains sufficient life to represent its stockholders in such a suit. In any view, it would be unseemly for this Court, in a suit upon the same lease, brought by one of the stockholders, to recover part of the same dividends, to hold the contrary. Such a decision might result in two judgments against the defendants, in different jurisdictions, for the dividends. Under such circumstances, as was well said by Emmons, J., in *Good-year Dental Vulcanite Co. v. Willis*, (1 *Bann. & Ar.*, 573,) "every suggestion of propriety and fit public action demands" that the decision of the co-ordinate tribunal "be followed until modified by the appellate Court."

Judgment is ordered for the defendant.

Edward L. Andrews, for the plaintiff.

John E. Burrill, for the defendant.

THE HOLMES ELECTRIC PROTECTIVE COMPANY

vs.

THE METROPOLITAN BURGLAR ALARM COMPANY. IN EQUITY.

Letters patent No. 120,874, granted to Edwin Holmes and Henry C. Roome, November 14th, 1871, for an improvement in electric linings for safes, are valid.

There was invention in making an electric lining to an outer covering for a safe, insulated from the safe, and so arranged that an attempt to get through the covering will affect the electrical conditions, and thereby give an alarm, although the outside of houses and other buildings and rooms had before been electrically protected.

Under § 4,887 of the Revised Statutes, the term of a patent here is to be as long as the remainder of the term for which a prior foreign patent was granted, even though the latter patent has been suffered to lapse for non-payment of tax.

(Before WHEELER, J., Southern District of New York, August 28th, 1884.)

WHEELER, J. The orator's patent, No. 120,874, for an improvement in electric linings for safes, granted to Edwin Holmes and Henry C. Roome, November 14th, 1871, appears to be for an electric lining to an outer covering for the safe, insulated from the safe, and so arranged that an attempt to get through the covering will affect the electrical conditions and thereby give an alarm. The inventors could not have a valid patent for protecting safes by electricity, any more than Morse could for sending messages to a distance by that agency; neither could they for every form of device for that purpose, for, various such devices existed before their invention. They were entitled to protection only for their specific improvements upon what existed before. (*Railway Co. v. Sayles*, 97 U. S., 554.) So far as shown, there were no such insulated coverings fitting the outside of safes before. There were such protections for the outside of houses, and other buildings, and rooms, but none for the safes themselves. The application of

this form of protection to the safes themselves is different from that to habitable structures. The patent appears now to be valid for this specific improvement. The claims are for a safe provided with the outer covering, and for the covering.

It is also urged, that the patent has expired, because the invention is the subject of a prior English patent, which has been suffered to lapse for non-payment of tax. The statute merely requires, that, in such case, the patent shall be so limited as to expire at the same time with the foreign patent. (*Rev. Stat., sec. 4,887.*) This seems to mean, that the term of the patent here shall be as long as the remainder of the term for which the patent was granted there, without reference to incidents occurring after the grant. (*Henry v. Providence Tool Co., 3 Ban. & Ard., 501; Reissner v. Sharp, 16 Blatchf. C. C. R., 383.*) It refers to fixing the term, not to keeping the foreign patent in force.

It is urged, that infringement has been so far acquiesced in that a preliminary injunction would now be inequitable, but this claim does not appear to have been borne out by the proofs.

The fact of infringement is not in reality contested. The patent has been so far acquiesced in, respected, and upheld, that, appearing to be good and valid as to this specific form of electrical protection, it affords sufficient ground for a preliminary injunction to restrain further infringement by the use of this form.

Motion granted.

Samuel A. Duncan, for the plaintiff.

Burton N. Harrison, for the defendant.

IN THE MATTER OF THOMAS DAVISON, ON HABEAS CORPUS.

D. enlisted in the army, at the age of 19, in July, 1870, for five years, deserted in February, 1872, and was arrested as a deserter in October, 1880, and held for trial by a court-martial. When he enlisted, he had a mother living, and dependent upon him for support, who did not consent to his enlistment. All the time between his desertion and his arrest he was in the city of New York. A *habeas corpus* being issued on his application, while he was thus held, to procure his discharge, on the grounds, (1) that his enlistment was void; (2) that, if a deserter, he was not amenable to trial, because more than two years elapsed, after he deserted, before he was arrested: *Held*,

- (1.) It was for the court-martial to decide whether the limitation of Article of War 103, (*U. S. Rev. Stat.*, § 1,342,) applied to the case, as that Court had jurisdiction of the offence, and the limitation was a matter of defence;
- (2.) Under §§ 1,116, 1,117, and 1,118 of the Revised Statutes, a minor over the age of 16 may enlist in the army, but his enlistment may, during his minority, become invalid, at the election of his parents or guardian;
- (3.) The enlistment being valid, the minor is bound by his representations forming part of the contract of enlistment.

(Before WALLACE, J., Southern District of New York, September 17th, 1884.)

WALLACE, J. This appeal is brought to review the decision of the District Court for the Southern District of New York, (4 *Fed. Rep.*, 507,) discharging, upon *habeas corpus*, the petitioner Davison from the custody of Captain Ward, of the First Regiment United States Artillery, commandant of the post of Fort Columbus.

It appears, by the record, that Davison enlisted in the army of the United States, in July, 1870, for the term of five years, deserted while on furlough in February, 1872, was arrested as a deserter and brought to Fort Columbus in October, 1880, and was held in the custody of the respondent, to await trial by general court-martial, at the time the writ issued. It further appears, that the petitioner was but 19 years of age when he enlisted; that he had a mother living and dependent

upon him for support, who never consented to his enlistment; and that, during the entire period between the petitioner's desertion and apprehension, he was within the city of New York. The petitioner's discharge was claimed on two grounds—first, that his contract of enlistment was void, and, therefore, he could not be held as a deserter; and, secondly, that, if he was a deserter, he was not amenable to trial, because more than two years had elapsed since the commission of the alleged offence.

The learned District Judge, in the opinion delivered by him, placed the petitioner's right to a discharge on the second ground. Article of War 103 (*U. S. Rev. Stat.*, § 1,342) declares, that "no person shall be liable to be tried and punished by a general court-martial, for any offence which appears to have been committed more than two years before the issuing of the order for such trial, unless, by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period." The District Judge reached the conclusion, that the offence of desertion was complete when the original act of desertion took place; that it was not to be deemed a continuing offence; and that, the facts of the petitioner's desertion more than two years before his apprehension, and of his continued presence within the United States, being undisputed, he could not be tried or punished by court-martial, and should, therefore, be released from custody.

Upon this appeal, a very elaborate argument has been made by the counsel for the military authorities, to show that the statutory limitation of Article 103 is not intended to apply to the offence of desertion; and if, as would seem to be plain, the offence is a continuous one, that is, is repeated completely every hour and every moment the soldier wilfully absents himself without leave, *animo non revertendi*, there is, certainly, fair room to contend, that the two years do not begin to run until he returns or is apprehended. On the other hand, if this construction of Article 103 should obtain, it would appear, that Congress, while intending to shield the deserter

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from punishment for the original desertion, and, possibly, for his persistent contumacy during a long period of years, also intended to subject him to punishment for remaining in a state of desertion during the two years last preceding his voluntary return to service, or his apprehension. Such a construction might lead to the singularly arbitrary and apparently useless result, of punishing a deserter in his extreme old age, when his return to military duty would be useless and farcical, while exempting him from criminal accountability for the flagrant offence originally committed.

The conclusions which have been reached, however, render it unnecessary, and, possibly, inappropriate, to adjudicate here the question thus suggested. It must be held, that it is for the court-martial, and not for this Court, to decide whether the statutory limitation can be invoked effectually by the accused, to protect him from punishment. If the petitioner was legally in custody, awaiting trial by court-martial for a military offence, this proceeding must fail. He was legally in custody, if the offence is one of which that tribunal has jurisdiction. It is not the office of a writ of *habeas corpus* to anticipate the action of the appropriate tribunal, by determining, in advance of its investigation and judgment, whether the accused is innocent or guilty of the offence for which he is held for trial, any more than it is to perform the functions of a writ of error, after a trial has been had. Courts-martial are lawful tribunals, existing by the same authority that this Court is created by, have as plenary jurisdiction over offences, by the law-military, as this Court has over the controversies committed to its cognizance, and, within their special and more limited sphere, are entitled to as untrammelled an exercise of their powers. As is said in *Ex parte Miligan*, (4 Wall., 123,) "The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common law Courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the

party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil Courts."

The question of the jurisdiction of a general court-martial may always be inquired into upon the application of any party aggrieved by its proceedings, and so may that of every other judicial tribunal; but the range and scope of the inquiry is controlled by the same rules and limitations in both cases. There must be jurisdiction to hear and determine, and to render the particular judgment or sentence imposed. If this exists, however erroneous the proceedings may be, they cannot be reviewed collaterally, upon *habeas corpus*. (*Ex parte Kearney*, 7 Wheat., 38; *Ex parte Watkins*, 3 Pet., 193; *Ex parte Reed*, 100 U. S., 13, 23.) It would be as indecorous, and as wanton a stretch of judicial power, to assume, in advance, that a general court-martial will erroneously convict the accused person of a military offence, as it would be to indulge such a presumption concerning a common law Court. The real inquiry is, therefore, whether the 103d Article of War is a statutory inhibition upon the jurisdiction of courts-martial over offences which appear to have been committed more than two years before the issuing of the order for trial, unless, by reason of the exception mentioned, the accused shall not have been amenable to justice within that period. The solution of this inquiry seems very plain. Articles 47 and 48 provide, that any soldier who, having been duly enlisted in the service of the United States, deserts the same, shall, in time of peace, suffer such punishment, excepting death, as a court-martial may direct, and shall be tried and punished by a court-martial, although the term of his enlistment may have expired previous to his being apprehended. Although Article 103 declares that no person shall be "liable to be tried and punished" by a general court-martial for an offence which appears not to have been committed within the two years, this language does not limit or qualify the jurisdic-

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tion of the military tribunals, but prescribes a rule of procedure for the benefit of the accused, to be considered and enforced upon the trial, in the exercise of a jurisdiction already conferred. The limitation is a matter of defence, which is to be entertained and determined like any other question involving an adjudication upon the merits of the case. Language almost identical, declaring that no person should be "prosecuted, tried or punished" for an offence not committed within two years before indictment found, was employed in § 32 of the Act of Congress of April 30th, 1790, (1 *U. S. Stat. at Large*, 119.) In *Johnson v. United States*, (3 *McLean*, 89,) arising upon *habeas corpus*, the Court held, that, although it appeared, upon the record of conviction, that the offence for which the relator was sentenced was not committed within two years, no want of jurisdiction was apparent; that the Court before whom he was tried had undoubted jurisdiction; and that, if the statute was a bar, it should have been pleaded. In *United States v. Cook*, (17 *Wall.*, 168,) the defendant sought to avail himself of the benefit of the same statute, by a demurrer to the indictment, and it was held to be a statute of limitations, and not available to the defendant by a demurrer.

The precise question under consideration was decided by the Circuit Court for the District of California, by Field and Sawyer, JJ., in *In re White*, (9 *Sawyer*, 49.) It was there held, on a proceeding in *habeas corpus*, that the limitation prescribed by Article 103 is a matter of defence, and that the court-martial was the tribunal having jurisdiction to try the charge of desertion, and to determine whether the limitation attached or not; and, because of these conclusions, the Court refused to discharge the relator, and remanded him to be dealt with by the military authorities.

If the relator was not duly enlisted in the service of the United States, he is not amenable to the jurisdiction of courts-martial. Not only is this the plain deduction from the statutory provisions which confer jurisdiction upon these tribunals, but such would be, also, the result, upon general principles.

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If his contract of enlistment was void, the Government acquired no right to his services; he never became a soldier and could not be a deserter.

It is insisted, for the relator, that the contract was void because he enlisted without the written consent of his parents or guardian. The provisions of the laws of Congress in force at the time of the relator's enlistment, so far as they affect the point, are reproduced in §§ 1,116, 1,117 and 1,118, of the Revised Statutes. The antecedent legislation of Congress upon the subject does not seem to afford any aid in the construction of these sections. The prior Acts are collated and referred to in *In re Riley*, (1 *Ben.*, 408,) and in *Seavey v. Seymour*, (3 *Cliff.*, 439,) but there is nothing in their provisions, or in any decisions of Federal Courts in construction of them, which materially assists in solving the question whether, under the present laws, the enlistment of a minor over 16 years of age is void, at his election. Section 1,116 is as follows: "Recruits enlisting in the army must be effective and able bodied men, and between the ages of sixteen and thirty-five years at the time of their enlistment." Section 1,117 enacts: "No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States, without the written consent of his parents or guardians; *Provided*, That such minor has such parents or guardians entitled to his custody and control." Section 1,118 enacts: "No minor under the age of 16 years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of a felony, shall be enlisted or mustered into the military service."

The reasonable conclusion warranted by these sections would seem to be, that the contract of enlistment of a minor under 16 years of age is void, but that, if he is over that age, it is valid, in the absence of fraud or duress, as to him, but, during his minority, is invalid at the election of his parents or guardian. It is not open to doubt, that Congress, under the constitutional power "to raise and support armies," may provide for the enlistment of minors with or without the consent

of their parents, and may give such effect and conclusiveness to the contract of enlistment as it may deem best. And it is equally clear, that, when the laws of Congress authorize the enlistment of minors, no question of the capacity of the infant to contract can arise. Whenever the common law disability is removed by statute, the competency of the infant to do all acts within the purview of the statute is as complete as that of a person of full age. (*United States v. Bainbridge*, 1 *Mason*, 71; *Rex v. Rotherfield Greys*, 1 *B. & C.*, 345; *Schouler's Dom. Rel.*, 560.)

Sections 1,116 and 1,118 authorize the enlistment of minors of the age of 16 years, and thereby affirm their competency to enter into a contract with the Government in that behalf; and it seems obvious, that § 1,117 was not intended for the benefit of the minor, or for his protection, because it has no application unless he has a parent or guardian who is entitled to his custody or control.

The 3rd Article of War (§ 1,342) has not been overlooked, but it does not seem to have any bearing upon the present question.

If such minors are competent to contract, they are competent to bind themselves by any representation or estoppel that may be an ingredient of the transaction out of which the contract arises. In many cases, the military authorities have no means of knowing whether the minor who applies to enlist has parents or guardians who are entitled to his custody and control. It is not reasonable to suppose that Congress intended to place it in the power of a minor old enough to perform military service, to deceive the military authorities by representing himself as of full age, or as without parents, or as manumitted from their control, and to recall his representations and repudiate his contract after he has been accepted as a soldier and received the benefits of his contract. The provision should not be extended to protect a party competent to contract, against the consequences of his deliberate agreement, or of his own misrepresentations, unless the language plainly requires such a construction. The

language is satisfied by a construction which permits the parents or guardian who are entitled to the services and custody of the minor to intervene and assert their rights, if their consent to his enlistment has not been obtained. Several adjudications are to the effect, that, under § 1,117, or former laws of Congress, of similar purport, the contract of enlistment would be held invalid on the application of the parents or guardian of the minor. (*Commonwealth ex rel. Leake v. Blake*, 8 Phila., 523; *Turner v. Wright*, 5 Id., 296; *Henderson v. Wright*, Id., 299; *Seavey v. Seymour*, 3 Cliff., 439.) None, however, are cited by counsel, or have met the attention of the Court, in which it has been decided that the minor, if over sixteen years of age, can assert the invalidity of his contract. The case of *Menges v. Camac*, (1 *Sergt. & Rawle*, 87,) arising under § 5 of the Act of January 20th, 1813, (2 *U. S. Stat. at Large*, 792,) is somewhat in point. The statute in that case was similar, in its provisions, to § 1,117, and Brackenridge, J., was of opinion that the minor was bound by his contract, although the enlistment was voidable by those who had a paramount authority over him.

Several adjudications are cited, to the effect that the oath of the minor at the time of his enlistment is conclusive upon the question of his age. Some of these rest upon the language of the statute in force at the time. The satisfactory ground for refusing the discharge, as the law now stands, seems to be, that the enlistment is void only as to the parent or guardian of the minor.

The order of the District Court is reversed, and the relator is remanded to the custody of the officer having him in custody, and the writ is discharged.

Henry Grasse, for the petitioner.

Asa Bird Gardner, opposed.

The Electric Gas Lighting Company v. Tillotson.

THE ELECTRIC GAS LIGHTING COMPANY

vs.

LUTHER G. TILLOTSON AND EDWIN S. GREELEY. IN
EQUITY.

In re-issued letters patent No. 9,743, granted to the Franklin Electric Gas Lighting Company, assignee of Jacob P. Tirrell, June 7th, 1881, for electrical apparatus for lighting street-lamps, the original patent, No. 130,770, having been granted August 20th, 1872, and the specifications of the original and the re-issue being precisely alike, what is claimed in claims 2 and 5 was not claimed anywhere in the original patent, as a part of the invention; that patent stood nearly nine years before those claims were made; the right under which the defendants operate had accrued before they were made; and those claims are invalid.

(Before WHEELER, J., Southern District of New York, September 18th, 1884.)

WHEELER, J. This suit is brought upon re-issued letters patent No. 9,743, granted to the Franklin Electric Gas Lighting Company, assignee of Jacob P. Tirrell, dated June 7th, 1881, for electrical apparatus for lighting street-lamps. The original patent was No. 130,770, dated August 20th, 1872. The infringement complained of was made under patent No. 230,590, dated July 27th, 1880, granted to George F. Pinkham; assignee of the same Jacob P. Tirrell, for an electric gas lighting apparatus. One of the defences is, that the re-issue is not supported by the original. The specifications of the original and re-issue are precisely alike. The original had three claims, for: "1. A circuit-breaker located at the burner and operated automatically, substantially as described. 2. In combination with the above, a lever, adapted and arranged to open and close the stop-cock or valve of the burner, and carrying the circuit-breaker, substantially as herein described. 3. The arms O Q, sector-wheels $f n$, pins $l l^2 m m^2$, and wires M N, magnet E, lever H, carrying armature G, circuit-

breaker J, and pawl S, and the ratchet-wheel R, all combined and arranged together, and applied to a gas-burner, for operation, substantially as, and for the purposes, set forth."

The re-issue has six claims. The first and sixth are for combinations not found, nor claimed to be, in the alleged infringing device; the third is the same in each; and the fourth in the re-issue is the same as the second in the original. There is in the alleged infringement no lever to open and close the stop-cock, and carrying the circuit-breaker, to form the combination of the original second, now the fourth, claim, nor arms, sector-wheels, pins, pawl or ratchet-wheel, to form the combination of the constant third claim. The only claims remaining, and the only ones relied upon here, are the second and fifth. They are for: "2. In an apparatus for lighting gas by electricity, the helix of an electro-magnet connected at one end with the wire through which the current of electricity is passed, and at the other end with a circuit-breaker located at the gas-burner, so arranged that the current of electricity is passed to the circuit-breaker through said magnet, attracting an armature-actuating mechanism operating automatically to turn on the gas and light the same by the effects of the primary sparks made at the tip of the burner from said magnet in the circuit." "5. In an apparatus for lighting gas by electricity, the combination of a wire through which a current of electricity is passed, actuating mechanism for letting on the gas, an electro-magnet electrically connected with said wire, an armature operated by said electro-magnet, mechanism actuated by said armature, breaking the circuit at the burner-tip, and producing there an electric spark or sparks for lighting the gas, the whole operating automatically." These claims do not refer to any mechanism described for turning on the gas or breaking the circuit, but are drawn to apply to any mechanism operative, in the proper connection, with the parts described, for those purposes. When the circuit is closed, a current of electricity may be sent through the helix, and around the circuit, past

the burner-tip. This will charge the helix with electricity, so that it will attract the armature to itself. If any mechanism is attached to the armature, so that the motion of the armature will break the circuit at the burner-tip, a spark will be formed there from the flowing current, but the current, if not too powerful, will cease. This will relieve the helix from the charge of electricity and the armature from its attraction, and leave the armature free to move away from the helix, and, by its motion through the mechanism, to close the circuit, when, if the supply of electricity is continued, the operation will be repeated. The motion of the armature may, by appropriate mechanism, be made to open and close the stop-cock, as well as to break and close the circuit. These claims seem to be intended and appropriate to cover this arrangement of the wires and helix in the circuit with the circuit-breaker, and with the armature moving by the force of the current, and some mechanism by which the motion of the armature will break and restore the circuit and move the stop-cock, without regard to the form of the mechanism. The parts necessary to be described are well enough described with the arrangement of the whole; the rest is left to the common knowledge of those skilled in such matters. (*Loom Co. v. Higgins*, 105 U. S., 580.) But this arrangement of these parts was not claimed anywhere in the original patent, as a part of the invention. The first and second claims contained no allusion to the wires, helix or armature; the third was for these and several other parts, *all* combined and arranged together, and applied to a gas burner for operation, thus showing an intention to claim that particular combination of the whole. (*Gage v. Herring*, 107 U. S., 640; *Clements v. Odorless Apparatus Co.*, 109 U. S., 641.) The original patent stood nearly nine years before these claims were made. The right under which the defendants operate had accrued before they were made. They cannot be upheld now, as this case, and the decisions made upon this subject, are understood. (*Miller v. Brass Co.*, 104 U. S., 350.)

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Let there be a decree that these claims are invalid, and that the bill be dismissed, with costs.

Edwin H. Brown, for the plaintiff.

Edward N. Dickerson, Jr., for the defendants.

THE STEAM STONE CUTTER COMPANY

vs.

CHARLES SHELDON AND OTHERS. IN EQUITY.

W. made and sold for use, to S., 5 machines which infringed a patent of C. C. had a decree in equity against W. for the profits of such sales, which was satisfied, in part by money, and, as to the rest, by levy on real estate. S. derived profits from the use of the machines. In a suit in equity by C. against S. to recover such profits, there was an interlocutory decree for the plaintiff, which directed an account of the profits before a master. On his report of the above facts: *Held*,

- (1.) S. was not liable to C. for the profits of the use;
- (2.) The bill must be dismissed.

(Before WHEELER, J., Vermont, October 7th, 1884.)

WHEELER, J. The master's report shows that the Windsor Manufacturing Company made and sold for use, to the defendants, five channelling machines, for cutting out marble from quarries, which were infringements upon the orator's patents; that the orator has had a decree against the Windsor Manufacturing Company, for the profits of these sales; that the decree has been satisfied, in part, by the payment of money, and, as to the residue, by levy on real estate, the title acquired by which is in litigation, but has so far been decided in favor of the orator; and that the defendants have derived profits from

the use of the machines, to the amount of \$5,320.03, for which they should account to the orator, if liable to account at all for such profits. Various questions bearing upon the correctness of this amount are raised by exceptions to the report. The principal question is as to the right of the orator to recover these profits at all, after having recovered profits for the sales.

The decrees for the accounts in each case were made under the Act of July 4th, 1836. The exclusive right conferred by patents always has been to make, use, and sell for use, the patented invention. In the Act of April 10th, 1790, (*chap. 7, § 1, 1 U. S. Stat. at Large, 109*), the words were, "the sole and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention or discovery." In the Act of February 21st, 1793, (*chap. 11, § 1, 1 U. S. Stat. at Large, 318*), the words were the same. In the Act of July 4th, 1836, (*chap. 357, § 5, 5 U. S. Stat. at Large, 118*), the words were changed to "the full and exclusive right and liberty of making, using and vending to others to be used, the said invention or discovery." By the Act of July 8th, 1870, (*chap. 230, § 22, 16 U. S. Stat. at Large, 201*), the words were again changed to "the exclusive right to make, use, and vend the said invention or discovery." The effect of these expressions obviously is, and was intended to be, the same throughout, and is to give an exclusive right to make, use, and sell for use. In the Act of 1790, (§ 4,) an action was given for devising, making, constructing, using, employing or vending patented articles without consent of the owners of the patent in writing. In the Act of 1793, (§ 5,) the expression was changed to give an action for making, devising and using or selling. The words were again changed, in § 3 of the Act of April 17th, 1800, (*2 U. S. Stat. at Large, 38*), to "make, devise, use or sell." By §§ 14, 15 and 17 of the Act of 1836, the owners of patents were left to their actions at law, with the power of the Court to increase the damages, and to their right to proceed in equity where equitable relief was necessary, for infringements, without any words in the statutes to

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express what should be an infringement or what actions might be sustained for. (*Root v. Railway Co.*, 105 U. S., 159.) The exclusive right was left to be, to make, use, and sell to others for use. The mere sale of the materials of a machine complete and fit for operation would not be an infringement of the patent on the machine, unless the sale was for use. (*Savin v. Guild*, 1 *Gallis.*, 485; *Whittemore v. Cutter*, *Id.*, 478.) When the orator recovered the profits of an infringement by the making and selling of these machines, it must have been a recovery for a sale for use, for such a sale only could be recovered for. The sale apart from the use would not be distinguishable as an infringement. The recovery was as for a tort, consisting of the selling and using under the sale. The jurisdiction of the Court of Equity over the case rested upon the necessity for equitable relief in granting an injunction. Having jurisdiction, the Court retained the case, and took an account of the profits of the defendant there, and decreed them to the orator, in order to do justice, as far as possible, by administering full relief. These principles are fully and elaborately explained and set at rest, for the Courts of the United States, in *Root v. Railway Co.* Perhaps, in an action for damages, the orator might have recovered more than the amount of the profits, but, if so, the recovery would have been for the same thing at a higher rate of damages. The orator elected to take the profits as the measure of the recovery. Another recovery for the same thing could not be had against that defendant; neither could it any more be had against any other joint tort-feasor. Undoubtedly, an action at law, or a bill in equity during the life of the patent, could be maintained against these defendants, for their use of the machines apart from the sale, if there had been no recovery for the sale and use; and, so, an action might, doubtless, have been maintained against both the Windsor Manufacturing Company and the defendants, for the use of the machines by the defendants, without reference to the profits of the sales. The defendants here would be liable because they infringed directly by the use; the Windsor Manufacturing Company would be liable be

cause, by the sale, it authorized and promoted the use. They were joint tort-feasors, as to the use. One of them has made satisfaction, and but one satisfaction can be had. Had the orator proceeded for the profits of the use, none could have been recovered of the Windsor Manufacturing Company, for none were made out of the use, by that company. (*Elizabeth v. Pavement Co.*, 97 U. S., 126.) From these defendants it could recover the full profits of the use, as is sought to be done now. The defendants here might have been joined in a suit against infringement by the sale to them, but they could not be held for the profits of the sale, for they made none out of that. The orator could not, in any mode, recover both for the profits of the sale for use and the profits of the use. Each was a trespass upon the orator's exclusive rights, but not a separate and distinct trespass. A recovery for one would include a recovery for a part, at least, of the other, so that a recovery could be had for either, but not for both. The orator having had a recovery for one, cannot now have another for the other. (*Chamberlin v. Murphy*, 41 Vt., 110.)

It is said that the plaintiff has not retained full satisfaction. But, the execution for the enforcement of the decree against the Windsor Manufacturing Company has been returned satisfied; and has not been revived, as not actually satisfied. In trespass *quare clausum*, the defendant pleaded that the plaintiff distrained his hog, damage feasant, for the same trespass. The plaintiff replied, that the hog escaped without his consent, and he was not satisfied. On demurrer, it was held that the action would not lie. (*Vasper v. Eddows*, 1 Salk., 242, and *Buller's N. P.*, 84.) Satisfaction need not be in money. The taking of the body of a defendant may be a full satisfaction, and yet yield no money. The return of the execution as satisfied is plenary evidence of satisfaction, while it stands. (*Magniac v. Thomson*, 15 How., 281; *Bac. Abr., Execution D.*)

There is another view of this question, which has been touched upon formerly in this case, and that is, that the recovery of the profits of the sale for use vested the title to the use

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in the purchaser of the machines. (*Steam Stone Cutter Co. v. Sheldon*, 21 *Blatchf. C. C. R.*, 260.) It was upon this ground that the recovery of the profits against the Windsor Manufacturing Company was based. (*Steam Stone Cutter Co. v. Windsor Manufacturing Co.*, 17 *Blatchf. C. C. R.*, 24.) This view is supported by several decided cases. (*Perrigo v. Spaulding*, 13 *Blatchf. C. C. R.*, 389; *Spaulding v. Page*, 1 *Sawyer*, 702; *Allis v. Stowell*, 15 *Fed. Rep.*, 242.) And it is not inconsistent with *Blake v. Greenwood Cemetery*, (21 *Blatchf. C. C. R.*, 222.) There, merely nominal damages had been recovered against a manufacturer of the infringing machine, with an injunction. The defendant purchased the machine, and set up the former recovery as a bar to a recovery for the infringement by its use by him. This was held to be no bar, because there had been no recovery for this use, or for the profits or damages on a sale for use. Where an owner of a patent has compensation for the sale of a specific machine embodying the invention, that machine is forever freed from the monopoly. (*Bloomer v. Millinger*, 1 *Wall.*, 340.) A compensation by recovery, in an action for the same thing, should have the same effect.

Although there has been an interlocutory decree for the orator, still, as, upon the master's report, the orator is not entitled to recover, a final decree for the defendants is proper. (*Fourniquet v. Perkins*, 16 *How.*, 82; *American Diamond Drill Co. v. Sullivan Machine Co.*, *ante*, p. 298.) The interlocutory decree is understood to have been entered by consent, without hearing, and some other proceedings have been had, which may affect questions of costs, and those questions are left open.

Let there be a decree dismissing the bill.

Aldace F. Walker and *John W. Stewart*, for the plaintiff.

Edward J. Phelps and *Walter C. Dunton*, for the defendants.

DANIEL VALENTINE

vs.

REUBEN T. HURD AND OTHERS. IN EQUITY.

R., in Vermont, being insolvent, executed to V., July 21st, 1880, a mortgage on the homestead farm of R., in which his wife joined, for \$15,000, which was recorded August 9th. R. started a composition with his creditors, by deed dated July 27th, by which those who signed and sealed it agreed to take 25 *per cent.*, in compromise, in four months from that date, and that R. might, during that time, dispose of his property, towards paying the composition. It was not provided that all the creditors should sign. V. was a creditor and signed. In October, knowing that the money was to be raised to pay the composition, he advanced the \$15,000 to R., who fled to Canada, paying little to his creditors, and abandoning the composition. The mortgage covered all the property the creditors could reach. B., a creditor, had agreed, for 25 *per cent.*, to assign his claim to a brother of R. H. had an attachment on the farm, prior to the mortgage, the *ad damnum* in the writ being \$1,500, but he obtained judgment for a larger amount. For \$125 paid him he signed and sealed the deed, and delivered to R. a writing discharging his attachment. B. first, and afterwards other creditors, attached the farm in 1881. Neither B. nor H. received the 25 *per cent.* In a suit by V., to foreclose the mortgage, in which B. and H. and the other attaching creditors were parties: *Held*,

- (1.) B. was really a party to the composition deed;
- (2.) That deed was good as to those who signed and sealed it;
- (3.) The mortgage was void as to those who did not sign the composition, who could attach the property;
- (4.) To the extent of the \$500 homestead exemption, it was not void;
- (5.) V. was entitled to a foreclosure, as to the \$500 homestead right exemption, against all the defendants; against all but H., of the value of \$1,500, and against him on paying 25 *per cent.* of his debt; against all but B., of the amount of his attachment, and against that on paying 25 *per cent.* of his debt; and to no foreclosure against the attaching creditors subsequent to B.

(Before WHEELER, J., Vermont, October 7th, 1884.)

WHEELER, J. This suit is brought to foreclose a mortgage of \$15,000 on the homestead farm of the defendant Reuben T. Hurd, situated in Arlington, Vermont, against his attaching creditors, as well as against him. The mortgage was executed on the 21st of July, 1880, at Arlington, in the absence of the

orator, and was recorded in the land records of Arlington, as required by the laws of the State, on the 9th of August following. The consideration was advanced, \$5,000 on the 1st, and \$10,000 on the 8th, of October following, by the orator, to a brother of the mortgagor, at Aurora, Illinois, where the orator resides. The mortgagor makes no defence. The creditors defend upon the ground that the mortgage is fraudulent and void as to them.

The mortgagor was, at the time of the execution of the mortgage, hopelessly and desperately insolvent, and this became fully known to the orator when he became informed of the mortgage. The mortgagor started a composition with his creditors, by deed dated July 27th, 1880, in which the creditors signing and sealing agreed to "accept, receive and take, of and from the said Reuben T. Hurd, his executors and administrators, for each and every dollar of our respective claims and demands against said Reuben T. Hurd, the sum of twenty-five cents, in full satisfaction, payment and discharge of all and every our debts, claims and demands, such composition to be paid to us, severally and respectively, within four months from the date of these presents." And they further therein agreed, that he might, "from time to time and at all times hereafter, within the said term of four months from the date hereof, assign, sell, or dispose of his property, stock and effects," "for and towards the payment and satisfaction of the composition of the debts, claims or demands of us and every of us."

There was no provision that all the creditors should sign. The orator was a creditor before the mortgage, and signed, and became fully aware of, the composition deeds. The defendant, the Batterskill National Bank, for a consideration paid, agreed to assign its claim to the brother of the mortgagor, for the further consideration of twenty-five cents on the dollar to be paid, in order that the claim might be brought within the terms of the composition. The defendant Hawley had an attachment on the farm prior to the mortgage, the *ad damnum* in the writ, and amount directed

by the writ to be attached, being \$1,500. For a consideration paid, he signed the composition deed, and signed a writing stating that he released and discharged the liens by the attachment, and discontinued the suit as to Hurd, and delivered it to him. The other defendants did not become parties to the composition. The twenty-five *per cent.* was not paid to the Batterskill Bank, nor to Hawley. The mortgagor gave up carrying through the composition, and, with the money received from the orator, fled to Canada, without paying his creditors any considerable part of it.

At the time when the money was advanced by the orator upon this mortgage, it covered all the property then within the reach of the mortgagor's creditors, and the orator was fully aware of this fact. That the loan was negotiated by the mortgagor for the purpose of obtaining money to pay the twenty-five *per cent.* on the composition well enough appears; and this purpose was understood by the orator. That the mortgagor intended, when he received the money, to take it beyond the reach of his creditors, if the composition failed, is, also, apparent. There is no evidence that the orator knew of this purpose; but he was fully aware that placing the money in his hands without safeguard would enable him to avoid his creditors, if he would.

The case stands differently as between those who were parties to the composition agreement and those who were not. And, as to this, the Batterskill Bank was, in reality, although not nominally, such a party. It brought itself within the scope and effect of the agreement.

It is not considered that it would be necessary that all the creditors should become parties to the composition, to make it binding. In *Cobleigh v. Pierce*, (32 *Vt.*, 788,) there was an express provision that all should sign, to make the agreement valid. In *Chase v. Bailey*, (49 *Vt.*, 71,) the provisions were such, for dividing the property of the debtor *pro rata* among his creditors, that it could not be carried out unless all should sign. Not so here; the agreement of each creditor is several. The consent of more than one creditor might be necessary for

a consideration, where the contract is simple and a consideration required. But this contract is under seal, which imports a consideration, and would bind Hawley, who sealed it with his seal; and the Batterskill Bank received a consideration for what it entered into; and, besides, the procuring the agreement of the others who did sign would, probably, be a sufficient consideration, of itself, for that undertaking. The mortgage was fully accomplished within the four months, by being made, accepted and recorded, and the money advanced. The mortgagor had the right to dispose of his property for the payment of the twenty-five *per cent.* on the debts, at any time within the four months. Any party to the compromise had the full right to purchase the property, or take lien upon it, during that time, for that purpose, but, impliedly by the terms of the agreement, not for any other purpose. Had the mortgagor paid Hawley the twenty-five *per cent.* on his claim, and the Batterskill Bank twenty-five *per cent.* on its claim, within the four months, they would have had no just ground to complain against the mortgage. If they were defrauded by it at all, it was only as to the twenty-five *per cent.* The orator knew, that, by the effect of the agreement, the mortgagor had no right to dispose of his property by mortgage or otherwise, except "for and towards the payment and satisfaction of the composition." He had no right, as to them, to loan money, on a mortgage, to the debtor generally, during that time. The property was expressly charged with the trust, as between the parties to the agreement, of paying the twenty-five *per cent.* The orator violated the trust, when he loaned the money generally on the mortgage, without seeing to it that the twenty-five *per cent.* was paid. He, at least, took the risk of seeing that the money went for that purpose, and, as it went from him into other channels without the consent of Hawley or the bank, he is responsible, and not entitled to a decree of foreclosure, as against them, without providing for the payment of the twenty-five *per cent.* of their claim, with interest from November 27th, 1880, before which day that amount should have been paid.

By the statutes of Vermont, the orator in a bill to foreclose a mortgage may join as a defendant any subsequent attaching creditor of the premises sought to be foreclosed. (*Rev. Laws of Vermont, sec. 762.*) Creditors who did not become parties to the composition, and have attached the premises subsequently to the mortgage, are made defendants under this statute. Their rights are to be determined.

The mortgagor's liabilities were from \$125,000 to \$150,000, and his assets were only about \$50,000. The mortgage was executed at Arlington, while the orator was at Aurora, and apparently without his knowledge. The effect of it was to place substantially all of the attachable property of the mortgagor in Vermont under its cover. From the course and proceedings of the mortgagor, the obvious purpose of it was to induce or compel his creditors to accept of the composition, and to provide means for the payment of the percentage, if they should accept. When it was brought to the knowledge of the orator, he was or became fully aware of its effect. He must have known that its existence on the record would be a great embarrassment and hindrance to creditors. Still he placed it upon the record, without then advancing any consideration, and, in the language of the statute of 27 *Elizabeth, chap. 4*, left it to stand, "coloured nevertheless by a fained countenance and shew of words and sentences, as though the same were made *bona fide*, for good causes, and upon just and lawful considerations;" or, in the language of the statute of Vermont, justified the same to have been made, had and executed in good faith and upon good consideration. (*Rev. Laws of Vermont, sec. 4,156.*) Afterwards, he advanced the consideration, but not until all prior liens were, as he supposed, removed out of its way, so that, when the mortgagor got the money which became the consideration of the mortgage, he could hold it in defiance of all his creditors, with the mortgaged premises covered by the mortgage, and, apparently, out of their reach. The purpose for which the orator testifies he understood the consideration was to be used, was to pay the twenty-five *per cent.* on the composition. It does not ap-

pear how far the composition had proceeded when he made the advance, but it does appear that many creditors never became parties to it, and that those who did were not paid the twenty-five *per cent.*, to any considerable amount. The latest information which he received, according to his own account, was from the mortgagor, that he was "getting along very well with compromise—there a few who stand out about the matter, but not large amounts—hope to get it all fixed soon." If all the creditors became parties to the composition and received their share under it, none would be defrauded by the mortgage; but if any did not, and the purpose which the orator understood was to be carried out, to pay those who did, those who did not would be defrauded. The property would be gone, and they be left without pay, with the mortgagor's property all the while out of their reach for collecting their pay. In the language of Lord Bacon upon the resolutions in *Troyn's Case*, (3 Co., 80,) "it would prove injurious to other creditors of the same debtor, in depriving them of all means of satisfying themselves by the stated methods of justice." (*Bac. Abr., Fraud, C.*)

If the composition was carried out, its purposes were laudable; if not, they would be fatal to those not joining in it. The orator did not wait to see whether all would join or not. He had full knowledge of the situation, and made the advances in view of the effect which would follow a failure. He purposely aided in putting all the attachable property of the mortgagor under the cover of the mortgage, beyond the reach of the creditors of the mortgagor, if the mortgage should be upheld. Such conveyances as place substantially all of the property of the debtor beyond the reach of creditors have always been held fraudulent and void in Vermont, by whose laws this case is to be governed. (*Edgell v. Lowell*, 4 Vt., 405; *Root v. Reynolds*, 32 Vt., 139; *Church v. Chapin*, 35 Vt., 223; *Prout v. Vaughn*, 52 Vt., 451.) This mortgage cannot be upheld, as against the creditors who are not affected by the composition proceedings, to cover property which they could reach, without going contrary to the pro-

visions of the statutes of 13 *Elizabeth*, chap. 5. and 27 *Elizabeth*, chap. 4, as they have been expounded from the earliest times. In the report of *Twyne's Case*, (3 Co., 82a,) which is one of the earliest, it is said: "And because fraud and deceit abound in these days more than in former times, it was resolved in this case, by the whole Court, that all statutes made against fraud should be liberally and beneficially expounded, to suppress the fraud." The reasons for this resolution have not ceased. The effect of this mortgage, with the purpose for which the orator says it was made, was to take the property from within the reach of the creditors, and put it beyond their reach, unless they would compound their debts.

The mortgaged premises were the homestead of the mortgagor and his family. His wife joined in the mortgage, pursuant to the laws of the State, so as to bind the homestead interest. To the extent of the homestead exemption, the mortgage was not fraudulent as to creditors, who could in no event reach that.

The defendant Hawley's attachment, made before the mortgage, has been pursued to judgment for a larger amount than the writ required to be attached, and followed by a levy of execution. The attachment of the Batterskill National Bank was made April 25th, 1881; that of Franklin E. Lawrence, June 6th, 1881; that of Thomas Fleming, August 27th, 1881; and that of Jerome B. Bromley, February 18th, 1882. All of these latter are still pending. Some question has been made about the validity of these attachments, in the argument. But they are set up as good, in the orator's bill, and could not well be attacked by him in the suit, after that. If they were not, no fatal irregularity is apparent.

The *ad damnum* in Hawley's writ was raised to make it large enough to cover the judgment rendered. Some question is made as to the effect of this proceeding upon the attachment. But no new cause of action could have been brought in by the amendment, for the law and practice of the State Courts do not permit the introduction of a new

cause of action in that manner. The attachment is founded upon the authority of the officer conferred by the command of the writ. It is measured by that command. In *Putnam v. Hall*, (3 *Pick.*, 445,) the command was made, by a slip of the pen, to be to attach, &c., to the value of \$6, instead of \$600. An amendment, by inserting "hundred," was held to dissolve the attachment. No amendment in the case of *Hawley* is understood to have been made in this respect. The command of the writ was to attach the goods, chattels and estate of the defendant, to the value of \$1,500. The service of it created a lien upon the estate to the amount of \$1,500. The mortgage was made subject to this attachment, with others. It did not affect other creditors, as to the amount covered by this attachment, but only as to the amount which would remain over. The mortgage is valid, therefore, to cover this amount, in addition to the homestead right, except as to *Hawley*, and as to him except for the twenty-five *per cent.* When the Batterskill Bank made its attachment, it came next to *Hawley's*, and was good against the mortgagor and his property, for the amount of the debt and costs, within the amount commanded to be attached. The orator could meet it by paying the twenty-five *per cent.* of the debt. The mortgage was not fraudulent as to subsequent attaching creditors, except as to the property not covered by this attachment, in addition to *Hawley's*.

It follows, that the orator is entitled to a decree of foreclosure of the mortgage, as to the homestead right, against all the defendants; to a foreclosure against all but *Hawley*, of the value of \$1,500, covered by his attachment, and against him on payment of twenty-five *per cent.* of his debt, with interest from November 27th, 1880; to a foreclosure against all but the Batterskill National Bank, of the amount covered by its attachment, and against that on payment of twenty-five *per cent.* of its debt, with interest from the same day; and, as to the residue of the estate, he is not entitled to a decree against the creditors attaching subsequently to that attachment.

This construction of these proceedings makes the mortgage, in the language of these statutes of Elizabeth, as adopted in Vermont, void only as against the party whose right, debt or duty is attempted to be avoided. (*Rev. Laws of Vermont, sec. 4,155.*)

Hawley was promised \$125 for signing the composition. It may be thought that this should be provided for. But this was outside the composition and the promise void, even as to the party making it. (*Case v. Gerrish, 15 Pick., 49.*)

Let there be a decree of foreclosure, with costs of a foreclosure without contest, as to the homestead right, to the value of \$500, against all the defendants; as to the attachment lien of Hiram Hawley, to the amount of \$1,500 against all but him, and against him on payment to the clerk, for his benefit, by the orator, of twenty-five *per cent.* of his debt, with interest from November 27th, 1880, with his costs; as to the attachment lien of the Batterskill National Bank, against all but that bank, and against that on payment to the clerk, for its benefit, of twenty-five *per cent.* of its debt, with interest from November 27th, 1880, with its costs; that, unless such payment be made within 30 days, the bill be dismissed as to them respectively, with costs; and that the bill be dismissed as to the residue of the estate, and the defendants Lawrence, Fleming and Bromley, respectively, with costs.

Martin & Eddy and J. K. Batchelder, for the plaintiff.

A. L. Miner, J. C. Baker, Joseph G. Martin and H. A. Harman, for the defendants.

The Eastern Townships Bank v. The Vermont National Bank.

THE EASTERN TOWNSHIPS BANK

vs.

THE VERMONT NATIONAL BANK OF ST. ALBANS AND GEORGE
W. HENDÉE, RECEIVER.

A national bank had 7 directors. Its president wanted to borrow \$50,000 from it, but it had not that amount to lend to him. He applied to a bank in Canada. It refused because it could not lend the amount to him without exceeding the limit allowed to it for loans to individuals. But it deposited \$50,000, on interest, with the national bank. Four of the directors of the latter assented to the transaction, and the \$50,000 was entered on its books, as a deposit by the Canada bank. It paid interest on the deposit for 8 months, and afterwards suspended. Its receiver rejected the claim. In a suit to recover it: *Held*,

- (1.) The national bank had power to enter into the transaction ;
- (2.) It was made in the proper way, and was ratified ;
- (3.) The claim must be allowed, to be certified by the receiver, and paid ratably from the assets.

(Before WHEELER, J., Vermont, October 22d, 1884.)

WHEELER, J. This cause has, on stipulation of the parties in writing, been tried by the Court. The plaintiff is a corporation located and doing banking business at Sherbrooke, Canada. The defendant was organized as a national bank, under the laws of the United States, and located at St. Albans, Vermont. It had seven directors, one of whom resided in Montreal, Canada, and took no active part in its business. Its president owned about three-fourths of its capital stock, and was largely interested, as owner of stocks and bonds, in several railroads in Canada and the United States. These railroad companies were largely indebted to the defendant, on paper endorsed by him, and he was individually so indebted on his own paper. As the railroad enterprises turned, the railroad companies, the president and the defendant were badly insolvent. As was within fair expectation, they were sol-

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vent, and were supposed to be so. The president wanted \$50,000 to use, and could not be accommodated with that amount by the defendant. He applied to the manager of the plaintiff, at its banking house in Sherbrooke, for a loan of that amount, and proposed to put up bonds of one of the railroads, as collateral, and probably stated that the defendant had not funds from which to make the loan, as a reason for applying to the plaintiff. The manager of the plaintiff told him that it had funds sufficient from which to make the loan, and would do so, but that the individual loans were so large in proportion to its deposits in other banks, and so near the limit allowed, that the loan to him could not be made; that it could deposit in one bank as well as another, and would deposit that amount with the defendant, if he desired. He assented to this proposal, and they agreed that the deposit, while it remained, should draw interest at six *per cent.*, and that the same collaterals should be deposited as security. Thereupon, the manager of the plaintiff drew two drafts, of \$25,000 each, in favor of the defendant, on the National Exchange Bank of Boston, delivered them to the president of the defendant, and received the collaterals, and entered the transaction in the plaintiff's books, as a loan to the defendant. The president made the transaction known to the Montreal director, who made no question about it, and took the drafts to the banking house of the defendant in St. Albans, and delivered them to the cashier in the presence of the vice-president, who were directors, and acquainted them with the transaction, to which neither made any objection, and they received the drafts into the assets of the defendant, and credited the amount as a deposit, to the plaintiff, in the books of the defendant. No other such loan was ever made by the defendant; no vote of the directors was ever taken authorizing or ratifying it, and no conference was ever had among them concerning it, except as stated; and no objection was ever made by any of them to it. The drafts were endorsed, in the usual course, by the officers of the defendant, and forwarded to its correspondent in Bos-

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ton, from which it received credit for them, and it has always retained their avails.

It is claimed, that, in reality, this was a loan to the president of the defendant individually, and not to the defendant, and that it was put in the form it was to avoid the limit upon individual loans by the plaintiff. But it is found, as a matter of fact, from the evidence, that the loan to the plaintiff was refused because of that limit; that the loan was made to the defendant, upon its own credit, as a real transaction between the two banks, and not as a cover for any other transaction; and that it was proposed by the manager, and assented to by the president, and carried out between them, because it would accommodate the defendant and enable it to accommodate the president. This result was accomplished to some extent, but no loan or advancement of this amount, or of any amounts aggregating this amount, or near this amount, was made by the defendant to the president. It was enabled to accommodate him more by means of this deposit, and did so; but made no particular advance to him because he procured the deposit to be made. He was endeavoring to promote the interests of all his enterprises, including the defendant, as one of them, without intending to sacrifice that to any of the others; the plaintiff's manager was intending to make what would be for it a proper loan to or deposit with the defendant. The defendant twice paid interest to the plaintiff on the loan, bringing it up to May 21st, 1883; and, by letter from its cashier, twice acknowledged the deposit.

The drafts were dated and delivered to the president of the defendant, September 20th, 1882, and charged on the books of the plaintiff at the same time; they were received at the defendant's banking house, and credited to the plaintiff on its books, September 22d, 1882; the defendant suspended August 6th, and the receiver was appointed August 9th, 1883. This claim was presented to the receiver, and was finally rejected by him, November 27th, 1883. This suit was commenced January 3d, and the writ served on the president and receiver January 21st, 1884.

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It is objected in behalf of the receiver, that the making of this loan, or negotiating for the deposit, was not within the scope of the corporate powers of the defendant; and that, if it was, it was not so done, by those having the right to exercise these powers in such a case, as to bind the defendant.

If this was a deposit, there can be no question about the power of the association to receive it and become liable for it. To receive deposits is among the powers specifically delegated to national banks. (*Rev. Stat. U. S., sec. 5,136. Seventh.*) It was called a deposit between the officers of the two corporations; it became in form a deposit on the books of the defendant. It bore interest like a loan. If it was a loan, then the question is as to the power to borrow money. Among the powers of such banks, specially named, is that to make contracts. (*Sec. 5,136. Third.*) There is no apparent limit to this power except that contained in *sec. 5,202*. That section provides, that no association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and undiminished, except for circulation, deposits, and drafts drawn against existing funds, and to its stockholders. This implies, that it may become indebted within the limit, even if the power to make contracts generally should be held to apply to something else. Powers impliedly given are as well conferred as those expressly given. (*National Bank v. Graham, 100 U. S., 699.*) This debt did not come up to the limit alone, and it is not shown that there were any others of the kind to which the limit applies. The power seems to be clear.

The transaction was had with the officers usually entrusted with financial business. The president, vice president and cashier, all participated in it. These, with the director at Montreal, made a majority of the board; and, although he did not act as a director before, he appears to have been a director in fact, if not by right; but nothing is shown why he was not a lawful director. All are required to be citizens of the United States, and three-fourths must be residents of the State, territory or district. (*Sec. 5,146.*) This director may

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have been a citizen of the United States, and probably was, or he would not have been elected, and enough others appear to have been residents. If this were not so, the retention of the funds is a ratification by all of the means by which they were acquired. They could not both retain the funds and repudiate the transaction. Those who assumed to act for the defendant in the transaction were its agents, and acted as such, and, as said by Mr. Justice Swayne, in *People's Bank v. National Bank*, (101 U. S., 181 :) "If there were any defect of authority on their part, the retention and enjoyment of the proceeds of the transaction by their principal constituted an acquiescence as effectual as would have been the most formal authorization in advance, or the most formal ratification afterwards."

From these considerations it follows, that there must be a judgment for the plaintiff. Execution cannot issue upon the judgment, but it is to be paid by the comptroller from the assets, ratably with other claims. (*Rev. Stat.*, sec. 5,236.) The amount of the claims on which dividends are to be made, should, apparently, be adjusted as of the time when the comptroller took possession by appointing a receiver. In this case, this time appears to be August 9th, 1883. The amount of this claim to that time was \$50,650. The judgment is to be certified by the receiver to the comptroller, to be paid in due course of administration. (*Case v. Bank*, 100 U. S., 446.)

Judgment for plaintiff for \$50,650, to be certified by receiver to comptroller, with costs.

Edwards, Dickerman & Young and *George F. Edmunds*, for the plaintiff.

George W. Hendee and *Luke P. Poland*, for the defendant.

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THOMAS MELENDY vs. JOHN W. CURRIER.

Subdivision 3 of § 639 of the Revised Statutes is not repealed by the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470.)

The time of removal under that subdivision is not regulated by the Act of 1875; and a cause may, under that subdivision, be removed, after it has been once tried in the State Court and a new trial has been granted.

(Before WHEELER, J., Vermont, October 31st, 1884.)

WHEELER, J. This cause was begun in the State Court; was tried there and a verdict and judgment for the defendant had; this judgment was reversed on exceptions and a new trial granted; then it was removed into this Court, on an affidavit of local prejudice, under the Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 558,) now division 3 of section 639 of the Revised Statutes. It has now been heard on a motion to remand.

It is argued that this part of the Act of 1867 was repealed by the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) and that, if not, the time of removal is revised and regulated by the latter Act, and must be as early as the term at which the cause would first stand for trial. That this part of the Act of 1867 was not repealed by the Act of 1875, has been repeatedly decided. (*Cooke v. Ford*, 16 *Am. Law. Reg., N. S.*, 417; *Sims v. Sims*, 17 *Blatchf. C. C. R.*, 369.) It is treated as in full force, notwithstanding the Act of 1875, in *Bible Society v. Grove*, (101 *U. S.*, 610.) In speaking of the provision prescribing in what cases a removal may be had, it is said by Mr. Chief Justice Waite, in the latter case: "The Act of March 3d, 1875, (18 *Stat.*, 470,) has not changed this provision of the Revised Statutes." This seems to settle the question as to the repeal of the Act of 1867.

The Act of 1875 is broad enough to include within its terms any case removable under the Act of 1867, and any such case might be removed without an affidavit of local

prejudice, by complying with the terms of the Act of 1875. For this reason it is said that it must govern as to the time of applying for removal. But, as the right to remove on account of local prejudice is left undisturbed by that Act, the means by which the removal may be had are left as incidents to the right. There is no doubt but that a revision of the whole subject-matter of a statute repeals it, and leaves the revising statute only in force; but this latter Act does not revise the whole of the subject-matter of the former; it leaves a part of it in force, and that part is in force according to its own terms. The Act of 1875 does not purport to prescribe the means for removal of causes except those removable under that Act. It in terms prescribes (§ 3) methods to any party "entitled to remove any suit mentioned in the next preceding section." This plaintiff was not entitled to remove this suit as mentioned in that section. (*Secs. 2, 3.*) He was entitled to remove it under the prior law, and must go to that for the means of effecting the removal. The cause was pending for trial when the attempt at removal was made, and had not reached a final trial. There had been a trial, but it did not prove to be final. A right to another trial had been perfected. This is what was held to be necessary in *Vannevar v. Bryant*, (21 Wall., 41.) It was there said by the Chief Justice: "To authorize the removal the action must, at the time of the application, be actually pending for trial." This was expressly decided by now Mr. Justice Blatchford, in *Sims v. Sims*, (17 Blatchf. C. C. R., 369.)

Motion denied.

L. H. Thompson, for the plaintiff.

Heman S. Royce and *John Young*, for the defendant.

VALENTINE FISCHER *vs.* GEORGE HAYES. IN EQUITY.

An interlocutory decree was made in a patent suit, in equity, appointing the deputy clerk of the Court a master to take an account of profits. This was done on the consent of both parties, in open Court. The decree did not, as required by the Act of March 3d, 1879, (20 *U. S. Stat. at Large*, 415.) assign special reasons for the appointment. The reference proceeded for 3 years, and the master made a report, for the plaintiff, which was excepted to and confirmed. Afterwards, the defendant moved to set aside the reference, showing that till after the confirmation his solicitor did not know of the statute, nor did the defendant know that the master was the deputy clerk: *Held*,

- (1.) The objection to the appointment was waived by the consent;
- (2.) The failure to assign the reasons in the decree could be disregarded or supplied, under § 954 or § 913 of the Revised Statutes;
- (3.) The defendant, by his delay in making the motion, had waived the objection to such failure.

Whether the statute applies to the appointment of a master of this kind, *quære*. The decree was amended *nunc pro tunc*, by reciting the fact of the consent, as a sufficient special reason for the appointment.

(Before BLATCHFORD, J., Southern District of New York, November 1st, 1884.)

BLATCHFORD, J. The deficiency appropriation Act of March 3d, 1879, (20 *U. S. Stat. at Large*, 415.) contained this provision: "No clerk of the District or Circuit Courts of the United States, or their deputies, shall be appointed a receiver or a master in any case, except where the Judge of said Court shall determine that special reasons exist therefor, to be assigned in the order of appointment." While this statute was in force, and on the 1st of February, 1881, this Court made and entered an interlocutory decree in this case, which is a suit in equity for the infringement of letters patent, awarding to the plaintiff a recovery of profits and damages, and directing a reference to John A. Shields, "as master *pro hac vice*" to take and report an account of profits and to assess the damages. Mr. Shields was at the time chief deputy clerk of the Court, duly appointed under § 624 of the Revised Statutes. The decree did not assign any special reasons for the appoint-

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ment of Mr. Shields. The master proceeded with the accounting down to January 10th, 1884, when he filed his report in favor of the plaintiff. Exceptions were filed to it, which were heard by the Court and overruled, and the report was confirmed. Now, on a showing that the solicitor for the defendant did not know of the statute until August, 1884, and that the defendant did not until the same time know that Mr. Shields was a deputy clerk of the Court, an application is made to set aside the reference to Mr. Shields, and all the proceedings under it, and his report, and to declare them void, because of the provisions of the statute.

It is shown that the solicitor for the defendant and the plaintiff's solicitor assented in open Court to the designation of Mr. Shields as master, at the time the interlocutory decree was presented and settled and signed. Under such circumstances, consent being an adequate special reason in a case of the kind, it must be presumed that, as the Judge appointed Mr. Shields, he determined that the consent was an adequate special reason. Nothing, therefore, remains but the irregularity of omitting to state the special reason in the decree.

The disqualification of the deputy clerk was for the benefit of the parties. They could waive objection to him and the Court could act on that waiver. Ignorance of the statute, by the solicitor, did not detract from the force of the waiver, no abuse or prejudice being now alleged. The solicitor does not aver that he did not know that Mr. Shields was deputy clerk. Knowledge of that fact by him was knowledge of it by the defendant.

The case is not one of consent to jurisdiction, or of a waiver of what public policy forbids to be waived. The appointment of a deputy clerk as master is not forbidden, but is allowed under certain circumstances, and with certain formalities. In a case where only an account is to be taken, and no moneys are to be handled, and the Court has full control of the report, there is no reason of public policy which forbids the assent of the parties to the appointment of a deputy clerk, or requires that that should not be an adequate special reason.

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The irregularity, if it was one, in a case of consent, of not specifying the consent, in the decree, as the special reason for the appointment, is a mere defect or want of form which may be disregarded or supplied by amendment, under § 954 of the Revised Statutes, or under the general power of a Court of Equity, under § 913.

Moreover, there was a waiver by the defendant, in carrying on the proceedings so long under the reference, and excepting to the report, and waiting till after an adverse decision, before making this application. The oath to a referee is waived by proceeding through a trial without objecting.

It is not entirely clear that the statute is not to be construed as applicable only to the cases where a master *ejusdem generis* with a receiver is appointed—a master through whose hands money or property is to pass, as a receiver, such as one to sell on foreclosure of a mortgage, or to administer property or funds. But, however this may be, the present case is a proper one in which to direct that an order be entered providing that the interlocutory decree dated February 1st, 1881, be amended *nunc pro tunc* as of that date, by inserting therein, before the words “to ascertain and take,” the words “(the solicitors for the respective parties having in open Court consented to the appointment of said Shields as such master, although he is the chief deputy clerk of this Court, and the Court now determining that such consent is a sufficient special reason for such appointment.)”

The same disposition is made of the application in the case against Neil.

Edmund Wetmore, for the plaintiff.

Frank R. Lawrence, for the defendant.

LEOPOLD MORSE

vs.

EMELINE CHENEY, EXECUTRIX, &C., OF ARTHUR CHENEY, DECEASED.

C., for a consideration of \$1,000, leased to M. a specified seat in a theatre, with the right to use it for 17 years, 4 months, and 9 days, when the theatre should be open for public performances "during the regular theatrical winter season of about forty weeks in each year," provided, that, in case of the destruction of the theatre by fire, or other unavoidable casualty, such right should cease, and C., and his executors, administrators, heirs and assigns, be released from all liability to M., and that if C., or his heirs or assigns, should, at any time, "elect to discontinue the use of the said building as a theatre, and to devote it to other purposes," he or they should have the right so to do, on tendering or paying to M. such proportion of the \$1,000, as the time then to elapse before the expiration of the lease should bear to the whole term. By the lease it was agreed, that, except during the "aforesaid regular theatrical winter seasons," and at all times except those at which M. should be entitled by the lease to use the seat, C., and his heirs and assigns, should have the use of it. C. held the land on which the theatre was built, under leases of it, reserving ground rents, which fact M. knew when he accepted the lease. He used the seat for over three years, during the regular theatrical winter seasons, till C., being in failing health, and having already lost a considerable sum of money by the theatre, ceased to give theatrical representations in it, and, less than six months afterwards, died, and the defendant was appointed his executrix. The ground rents not being paid, the lessors entered and evicted the defendant from the theatre, she not consenting. In a suit by M. against the defendant, to recover damages for being deprived of the use of the seat: *Held*,

- (1.) The lease contained no covenant, express or implied, for the enjoyment of the use of the seat during the term, nor any covenant that performances should be given for forty weeks, during the regular annual theatrical winter seasons;
- (2.) There was no covenant to pay back any part of the \$1,000 except under the special circumstances set forth in the lease;
- (3.) The plaintiff was not entitled to recover.

(Before BLATCHFORD, J., Connecticut, November 10th, 1884.)

BLATCHFORD, J. On the 1st of February, 1875, Arthur Cheney, the defendant's testator, executed and delivered to

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Leopold Morse, the plaintiff, a written instrument of lease, under seal, in the words and figures following :

“ Know all men by these presents, that I, Arthur Cheney, of Boston, in the Commonwealth of Massachusetts, in consideration of one thousand dollars to me paid by Leopold Morse, of Boston, in the Commonwealth of Massachusetts, do hereby grant, demise, and lease unto the said Leopold Morse and his executors, administrators, and assigns, the section and seat numbered Twelve in the orchestra of the new theatre building recently erected by me in said Boston, and known as the Globe Theatre, together with the right to use, occupy and enjoy the said section and seat, with the appurtenances, either by himself or by any other respectable and well-behaved person, and with the right of ingress and egress to and from the same, until the tenth day of June in the year one thousand eight hundred and ninety-two, subject, however, to all reasonable regulations for the care and management of said theatre and for the conduct of the audience therein, and to the following limitations, provisions and restrictions, namely : said section and seat shall not be used, occupied, and enjoyed as aforesaid, except when the said theatre shall be open for public performances or entertainments during the regular theatrical winter season of about forty weeks in each year, and then only when the grantee, his executors, administrators or assigns, shall, before nine o'clock of the evening of the day next preceding the day of every such performance or entertainment at which he or they intend to be present and to occupy the said section and seat, procure from the box office of said theatre a pass or ticket for entrance to said seat for such performance or entertainment, which pass or ticket shall be furnished without charge, on application, either in person or by written order, made at such office at the regular office hours, and shall be delivered up by the bearer, upon entering the theatre, to the door-keeper or to such other person as shall be then and there duly authorized to receive the same. Provided, nevertheless, that, in case of the substantial destruction of said theatre by fire or by

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other unavoidable casualty, all estate, rights, and easements, granted or created under or by virtue of this instrument, shall terminate and forever cease, and I and my executors, administrators, heirs, and assigns, shall thereupon be fully released and discharged from any and all liabilities to the grantee, his executors, administrators, heirs, and assigns, arising from or on account of these presents; and provided further, that, if I, or my heirs or assigns, shall at any time elect to discontinue the use of the said building as a theatre and to devote it to other purposes, I or they shall have the right so to do on paying or tendering to the grantee, or his executors, administrators, or assigns, such proportion of the above-mentioned sum of one thousand dollars as the time then to elapse before the aforesaid tenth day of June, 1892, shall bear to the full term of eighteen years, and all estates, rights, and easements hereby granted or created shall thereupon cease, and I and my executors, administrators, heirs, and assigns shall be fully discharged and released as aforesaid. It is understood and agreed, that, except during the aforesaid regular theatrical winter seasons, and at all times and occasions except those at which the grantee, his executors, administrators, or assigns, shall be or become entitled, under the preceding provisions of this instrument, to use, occupy, and enjoy the aforesaid section and seat, I and my heirs and assigns shall have the full control and free use and disposal of the same; and it is further agreed, that the estates, rights, and easements granted or created under this instrument shall be assignable by the grantee, or by his executors, administrators, or assigns, to any respectable person, by an instrument in writing, signed, sealed, and acknowledged by the assignor, and recorded in a book to be kept for that purpose by me or my heirs or assigns.

In witness whereof, I hereto set my hand and seal, this first day of February, A. D., 1875.

ARTHUR CHENEY. [*Seal.*]"

This suit was commenced on the 28th of July, 1881, by Morse, against the defendant, as executrix of Cheney, in the

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Superior Court of the State of Connecticut, for Hartford county, and was removed by her into this Court. It has been tried before this Court without a jury.

There are four counts in the complaint. The first, third and fourth are for breaches of covenants in the lease. The first count recites the contents of the lease, except the clause about fire and that about assignability, alleges that Cheney died November 1st, 1878, and sets forth, as breaches, (1) that, after May 11th, 1878, the plaintiff was not permitted by Cheney to occupy the seat; (2) that the defendant did not permit him to occupy the seat; (3) that Cheney, after May 11th, 1878, during his lifetime, discontinued the use of the building as a theatre, and devoted it to other purposes; (4) that the defendant discontinued the use of the building as a theatre and devoted it to other purposes.

The third count sets forth a copy of the lease, and avers that Cheney covenanted, by the lease, that the plaintiff should quietly enjoy the use and occupation of the section and seat during the term of the lease; that the plaintiff paid to Cheney rent in advance for the full term of the lease, being \$1,000; that, on or about _____, 1878, the owners of the theatre lawfully evicted Cheney, and all holding under him, of whom the plaintiff was one, therefrom, and still withhold possession from him and them and the defendant; and that since that time the plaintiff has not been permitted by Cheney or the defendant to occupy the seat.

The fourth count sets forth a copy of the lease, and avers the payment of rent in advance for the full term of the lease, and alleges, as a breach, that Cheney, from and after May 11th, 1878, discontinued the use of the building as a theatre and devoted it to other purposes, and the defendant continued to permit it to be devoted to other purposes.

The second count recites the contents of the lease, as in the first count, and avers the payment of the consideration, \$1,000; that Cheney, during his lifetime, after May 11th, 1878, did not permit the plaintiff to occupy the seat; that the defendant did not permit him to occupy it; that the consid-

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eration covenanted in the lease, for the payment of the \$1,000, failed in whole or in part; and that Cheney had and received said money for the plaintiff's use.

The answer denies all the allegations of breaches and liability, and sets up that the appointment of the defendant as executrix was approved by the proper Court of Probate on November 15th, 1878, and on the same day that Court duly passed an order limiting the time of presenting claims against the estate to six months from that date, which time expired May 15th, 1879, and the claim of the plaintiff was not presented to her within that time; that the inventory of the estate amounted to \$16,739 78, all of which was exhausted in paying claims and expenses; that, on the 12th of March, 1881, the defendant filed her account, as executrix, with the Probate Court, showing that the estate was so exhausted, and that nothing remained in her hands, which account was duly approved on that day, by the Probate Court; that she has fully settled the estate and accounted therefor; and that, at the time of the commencement of this suit, she had not in her hands any property of the estate.

The plaintiff's reply avers, that he is an inhabitant of Massachusetts; that Cheney, at the time of his death, was a resident of Manchester, Connecticut; that the defendant was and is a resident of Manchester; that the Probate Court for Manchester approved her appointment, and passed the orders mentioned in the answer; that the plaintiff's claim was presented and exhibited to the defendant, and against Cheney's estate, within two years after publication of the notice of the order of said Court of Probate limiting the time for presenting claims, as set forth in the answer; and that Cheney's estate was not represented as insolvent.

At the trial, it was understood and agreed between the counsel for the respective parties, that the answer should be regarded as setting up, as a defence, that the right of action herein accrued after the death of Cheney, and that the plaintiff's claim was not exhibited within twelve months after such

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right of action accrued; and that the plaintiff should be regarded as traversing, by a reply, that defence.

The case was tried on a statement of agreed facts, which is as follows:

"In addition to the facts admitted by the pleadings, the following facts, claimed by the plaintiff, are agreed by defendant to be true, if admissible, namely:

1. The several owners of the land in Boston, Massachusetts, occupied by the present Globe Theatre, duly leased the same to Arthur Cheney, defendant's testator, by the written leases, certified copies of which are annexed as part of this statement, marked Exhibits A, B, C, D and E. Asa P. Morse, lessor named in Exhibit E, also duly executed and delivered the lease recorded in Suffolk Registry of Deeds, vol. 895, fol. 305, a certified copy of which is annexed as part of this statement, marked Exhibit F; and Follett, lessee therein named, on April 19, 1869, duly assigned in writing, with the assent of lessor, to said Cheney, the said lease and all his right, title and interest therein and thereunder.

2. Said Cheney, in 1874 and prior to Feb. 1, 1875, removed the old buildings standing on the land embraced in all said leases, and erected thereon, according to the requirements and provisions of said leases, the present Globe Theatre, which he used and operated as a theatre thereafter, during the regular theatrical winter seasons of about forty weeks in each year, during the years 1875, 1876, 1877, and until May 11, 1878.

3. On Feb. 1, 1875, said Cheney, in consideration of the sum of one thousand dollars (\$1,000) in money, then paid to him by plaintiff, Leopold Morse, (who was then, and ever since has been, a resident, citizen, and inhabitant of Boston, Massachusetts,) duly executed and delivered to the plaintiff a written lease of section and seat No. 12 in the portion of said theatre called the orchestra (a copy of said lease being annexed to the complaint, marked Exhibit A); and plaintiff used, occupied, and enjoyed said seat and section, according to the terms of the lease to him, during the regular theatrical seasons,

until May 11, 1878, at which time said Cheney, being in failing health, and having already lost a considerable sum of money by said theatre, ceased to give theatrical representations in said theatre; and they were never resumed by him before his death, nor since then by his executrix. And said theatre remained closed until March 1, 1879, when same was leased to Stetson by the owners, as hereinafter stated in paragraph 5.

4. On or about Nov. 1, 1878, said Arthur Cheney, who was then a resident, citizen, and inhabitant of Manchester, Conn., died, leaving a will, which was duly proved and approved at a Probate Court, held in and for the District of said Manchester, on Nov. 15, 1878, and defendant was then duly appointed executrix under said will, which office she then duly accepted, qualifying therefor, and giving official bond as such executrix; and, on said Nov. 15, 1878, said Court of Probate passed an order limiting the time of presenting claims against said estate to six months from said date, and said estate has never been represented insolvent.

5. On Jan. 1, 1879, rent had become due under and by virtue of each of the ground leases, annexed as Exhibits A, B, C, D, E, and F, payment of which was duly demanded and refused. Whereupon, at or about that date, and prior to Feb. 10, 1879, said rent being then wholly unpaid, all the lessors in said leases, in accordance with the provisions thereof and of the laws of Massachusetts, duly entered in and upon their respective estates, and thereby terminated all said leases for such non-payment of rent and breach of condition relating thereto, and took exclusive possession of said premises and theatre, evicting defendant, and repossessed themselves as of their former estates, neither the defendant nor any representative of her or of said Cheney's estate being present at, nor participating in, said proceedings, nor giving actual consent thereto; and said Asa P. Morse immediately thereafter converted the portion of said theatre standing on his land into a store, which has ever since been used exclusively for business purposes. On March 1, 1879, all lessors named in said Exhibits A, B, C,

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and D, leased anew, by written leases for a term of about ten years, all the said premises and theatre to one John Stetson, of Boston, who at once took possession thereof and has ever since operated same as a theatre, that said Stetson has entered into no obligation with, but has wholly declined to permit plaintiff to in any way use, occupy, or enjoy his said seat and section, No. 12, therein, under the said lease thereof to him or otherwise, and plaintiff has always been ready to comply with all the provisions of the said lease to him.

6. Plaintiff duly presented and exhibited on Oct. 29, 1880, to defendant executrix, his claims against the estate of said Arthur Cheney, as embraced in this suit; and said defendant executrix disallowed and refused to pay the same, and, on March 31, 1881, notified plaintiff thereof, and within four months thereafter plaintiff brought this suit.

7. Neither said Arthur Cheney during his life, nor the defendant since his decease, has tendered or paid the plaintiff any part or proportion of said sum of one thousand dollars, paid by him as aforesaid for said lease of said seat No. 12, but have refused so to do; and the same remains unpaid.

The following facts claimed by the defendant are agreed by the plaintiff as true, if admissible:

1. The plaintiff, at the time of the execution and delivery of his lease from said Cheney, had actual knowledge that said theatre was built upon leased land.

2. At or soon after the time when theatrical performances in said theatre, under the management of said Cheney, ceased, he, said Cheney, offered to the plaintiff, and other holders of leased seats, to turn over to them said theatre and assign to them his ground leases,—they to assume his obligations under said leases,—but the plaintiff and other lessees of seats declined to accept the same. The whole number of seats in said theatre was fifteen hundred or more, of which one hundred and fifty were held under leases similar to the plaintiff's.

3. The probate proceedings in the settlement of said Arthur Cheney's estate are as stated in the defendant's answer, and the inventory and executrix account therein are made

part of this statement, copies being annexed marked G and H.

4. Previous to said lease of said seat to the plaintiff, a theatre, managed by said Arthur Cheney, standing upon substantially the same leasehold premises, had been destroyed by fire, and said Cheney was unable and unwilling to rebuild said theatre without financial assistance; and the plaintiff received said seat lease, and paid \$1,000 therefor, desiring to assist said Cheney to rebuild and equip said Globe Theatre, partly from motives of public spirit and the hope of mutual advantage, and not altogether as a commercial transaction."

The facts admitted in the answer are, the execution of the lease, the death of Cheney, and the appointment of the defendant as his executrix. Under the instruments mentioned in the statement of agreed facts, Cheney was the lessee of the land covered by the Globe Theatre, until June 30th, 1892, at ground rents reserved, payable monthly or quarter yearly. The inventory, G, shows that the appraised value of Cheney's estate was \$16,721 23. The account, H, shows an increase over the inventory of \$18 55, payments out of the estate, amounting to \$16,300 97, and a balance in hand, May 30th, 1879, of \$438 81; that, in October and November, 1880, claims against the estate were presented by 53 non-residents, including the plaintiff, amounting to \$91,000, based on leases of seats in the Globe Theatre, which the executrix had rejected; and that all other claims presented against the estate had been fully paid. The account was exhibited and allowed March 12th, 1881.

The plaintiff seeks a recovery principally on the third count of the complaint, which avers that Cheney covenanted, by the lease, that the plaintiff should quietly enjoy the use and occupation of the section and seat during the term of the lease, that is, until the 10th of June, 1892. If there was such a covenant, it has been broken. The question is, whether there was any such covenant. There is no such covenant in terms. But the plaintiff contends that the words "demise" and "lease" import a covenant by the lessor,

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that the lessee shall quietly enjoy the demised premises during the term; that the covenant implied is equivalent to a stipulation by the lessor that the lessee shall not be evicted or disturbed by himself or his successors in title, or by virtue of a paramount title; and that an expulsion from, or actual disturbance of, possession, constitutes a breach of the covenant.

It is urged by the plaintiff, that the language of the lease implies a covenant by Cheney, that, during the regular annual theatrical winter season of about 40 weeks, public performances or entertainments shall be given in the theatre, to which the plaintiff shall have access, under the lease; and that, if Cheney does not run the theatre for 40 weeks in each year, but discontinues it, and ceases to so operate it, he is to pay back a due proportion of the consideration paid.

Whatever would be the effect of the words "demise" and "lease," in the absence of any covenants on the subject of enjoyment, by way of qualification or limitation, it is clear that the express covenants in this lease, in regard to enjoyment, forbid any implication as to a covenant for quiet enjoyment growing out of the use of the words "demise" and "lease." It is covenanted, that, if the theatre is substantially destroyed by fire or by other unavoidable casualty, the rights created shall terminate on both sides, and the lessor, and his executors, administrators, heirs and assigns, be released from all liabilities under the lease. It is also covenanted, that, if the lessor, or his heirs or assigns, shall at any time elect to discontinue the use of the building as a theatre and to devote it to other purposes, he or they shall have the right so to do on paying or tendering to the lessee such proportion of the sum of \$1,000 as the time then to elapse before June 10th, 1892, shall bear to the full term of 18 years, and all rights created by the lease shall thereupon cease, and the lessor and his executors, administrators, heirs and assigns be released as aforesaid. The destruction of the theatre by fire or other unavoidable casualty is to terminate the lease, and, in that event,

the lessee loses all of his \$1,000, though this event may happen the day after the lease is made. No provision is made for paying anything back in that case. Then comes a provision for paying something back, in a particular event. The theatre is built on leased land, which fact the lessee knows, and the leases to Cheney run for a time longer than the lease to the plaintiff. Cheney may choose to devote the theatre building to some other use before June 10th, 1892, and make it a source of profit in that way. In such case, he is to pay back to the lessee such proportion of the \$1,000 as the unexpired time before that date bears to 18 years. Now, with a covenant for the termination of the lease, and the payment of nothing to the lessee, in case of a total destruction of the building, though it should happen the next day, and with a covenant for the payment back of a fixed proportion of the \$1,000, in case of a use of the building for other purposes by the lessor, it is not, in the absence of an express covenant for quiet enjoyment during the term of the lease, to be inferred that the lessor agreed, under an implied covenant for quiet enjoyment, to pay back the whole or any part of the \$1,000, or to pay any sum as damages, in case of any discontinuance except one of the character specified. Especially is this so in the absence of any covenant to keep the theatre open for public performances or entertainments during 40 weeks in each year. The mentioning of the 40 winter weeks is to give the lessee the right to use the seat only when the theatre shall be open during the 40 winter weeks, and to make it clear, in connection with a subsequent clause in the lease, that at all times except when, during the said theatrical winter seasons, the lessee shall be entitled to use the seat, the lessor shall have the free use of it, as during a summer theatrical season. In view of all this, the ceasing to give theatrical representations after May 11th, 1878, because of the failing health of Cheney, and his prior loss of money by the theatre, was a risk which the lessee and not the lessor assumed. Both parties knowing that the theatre was on ground leased to Cheney, a discontinuance of the use of the building as a

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theatre by Cheney, without a devotion of it to other purposes, would naturally involve non-payment of rent by Cheney and eviction of Cheney and the plaintiff. Hence, while there is a provision that in case Cheney should "elect to discontinue the use of the said building as a theatre, and to devote it to other purposes," he should refund the proportional part of the \$1,000, the election being intentional and voluntary, and involving a use of the building for other purposes, as well as a discontinuance of the use of it as a theatre, no provision is made as to a mere discontinuance of the use of the building as a theatre, unaccompanied by a devotion of it to other purposes. That might be caused by death, or ill health, or insolvency, and was a risk taken by the lessee.

This view of the lease shows, also, that the consideration did not fail, in whole or in part. The plaintiff obtained and has enjoyed all the rights which the lease conferred.

There is no proof that the lessor or the defendant devoted the building to other purposes after Cheney discontinued its use as a theatre. The fact agreed to by the defendant, is only that Cheney, being in failing health, and having already lost a considerable sum of money by the theatre, ceased to give theatrical representations in it, and they were never resumed by him before his death, nor since then by his executrix.

The causes of action set up thus failing, there is no occasion to construe the statute of Connecticut (*Revision of 1875, p. 388, secs. 4, 5 and 6,*) in regard to the time within which rights of action must be exhibited to an executor, or to determine when any supposed right of action in this case accrued.

Let a finding for the defendant, and a judgment accordingly, with costs, be entered.

Ranney & Clark and *C. J. Cole*, for the plaintiff.

C. E. Perkins and *John C. Parsons*, for the defendant.

In re Ah Kee, on Habeas Corpus.

IN THE MATTER OF AH KEE, ON HABEAS CORPUS.

A person of Chinese race, born at Hong Kong, after its cession to Great Britain, and always a British subject, by occupation a seaman, shipped as cook, at Calcutta, in June, 1884, on a vessel bound to New York, and arrived there, where the crew were discharged. He was arrested on shore, and held by a United States Commissioner, to be sent back to the country from whence he came, he having no certificate under § 6 of the Act of May 6th, 1882, (22 *U. S. Stat. at Large*, 58,) as amended by the Act of July 5th, 1884, (23 *Id.*, 116.) His intention was to ship, as soon as possible, as cook, on a vessel sailing for a foreign port. On *habeas corpus*: Held, that he was not a Chinese laborer, within the meaning of the Act of May 6th, 1882, (22 *U. S. Stat. at Large*, 58,) and that he should be discharged, on his own recognizance, in \$500, to ship on a voyage to a foreign port, within 30 days.

(Before BROWN, J., Southern District of New York, November 25th, 1884.)

BROWN, J. The petitioner, Ah Kee, being in jail, in the custody of the United States marshal of this District, has been brought before me upon *habeas corpus*. By the agreed statement of facts, it appears, that the petitioner is of Chinese race, language and color; that he was born on the Island of Hong Kong, after its cession to Great Britain, and has always been a British subject; that, for several years last past, he has been a sailor following the high seas, and usually shipping as cook; that, in June, 1884, he was shipped as cook, at Calcutta, by Captain Thorndike, on board the bark Richard Parsons, bound to New York, where she arrived on November 3d, 1884; that the crew were there discharged; that the master intended that the petitioner should remain on board his ship until he found a chance to ship as sailor on a return voyage; but that, a few days after the bark's arrival, Ah Kee came ashore, without the knowledge or consent of the master; that he was thereupon arrested by the United States marshal, on a warrant issued by a United States Commissioner, on complaint of the master, and, after examination, remanded to the custody of the marshal, to be sent back to the

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country from whence he came; that the petitioner has no certificate under section 6 of the Act of May 6th, 1882, (22 *U. S. Stat. at Large*, 58,) as amended by the Act of July 5th, 1884, (23 *Id.*, 116;) and that his intention and purpose are to obtain, as soon as possible, a position as ship's cook, on a vessel sailing for a foreign port.

This case is, in most of its features, identical with that of *In re Moncan*, (8 *Sawyer*, 350.) The persons were there released by Deady, J., because, first, they were simply on board of a vessel "touching" while on a voyage to a foreign port; second, they were here only as members of a crew of a vessel arriving from a foreign port, and taking on cargo for another, with some further reasons. (See, also, *In re Ho King*, 8 *Sawyer*, 438.)

I concur entirely in the reasons and conclusions stated in the opinion of Deady, J., in the case of *Moncan*. They seem to me decisive of this. The expressed object of the Act of May 6th, 1882, is to suspend for ten years the coming of Chinese laborers to the United States. The title of the Act is, "An act to execute certain treaty stipulations relating to Chinese." By Article I, of the Treaty of November 17th, 1880, (22 *U. S. Stat. at Large*, 826,) it is provided, that "the limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations." The persons prohibited by the Act from coming within the United States are throughout described by the phrase "Chinese laborers." The well known use and meaning of this phrase, and contemporaneous history, leave no doubt, in my mind, that the words "Chinese laborers" have no reference to seamen, in the ordinary pursuit of their vocation on the high seas, who may touch upon our shores, and may land temporarily for the purpose only of obtaining a chance to ship for some other foreign voyage as soon as possible, and who do not intend to make any stay here, or enter upon any of the occupations on land within this country. Such persons do not come to the United States as laborers, *i. e.*, as laborers within the United States,

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in the sense of the Act, and hence are not "included in the limitations."

Beside the general considerations above stated, there are particular provisions of the statute, from which the exclusion of sailors, as being outside of the intention of the statute, is to be inferred. By section 8, the master of any vessel arriving in the United States from any foreign port is required to "deliver and report to the collector of customs" "a separate list of all Chinese passengers taken on board his vessel at any foreign port or place, and all such passengers on board the vessel at that time," with various particulars there specified. In this section, the attention of the law-makers was brought face to face with the persons who come to this country on board vessels. The law requires a detailed statement in regard to "Chinese passengers," and heavy forfeitures are denounced for violations of this section. But there is no requirement to specify any Chinese members of the crew.

By section 12 of the Act, any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, "at the cost of the United States," &c. Is it credible that Congress intended that a seaman found here, who has landed only to ship on a return voyage in the ordinary course of his vocation, which would involve no cost or trouble to the United States, should be arrested and sent back at the cost of the Government? Plainly, as it seems to me, seamen are not within the spirit, or the letter, of the Act. The language of the Act throughout has evidently in contemplation persons coming within the United States as laborers. It intends nothing beyond that. The limitation of the treaty is express, that the restrictions shall only apply to Chinese who may come to the United States as laborers, that is, to be laborers within the United States. Chinese seamen, therefore, who only land temporarily, in the ordinary pursuit of their calling, for the purpose of shipping on a return voyage as soon as possible, are, in my judgment, wholly outside of the Act.

Section 6, requiring a certificate as regards persons other

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than laborers, who may be entitled to come within the United States, presents more difficulty. A careful attention to the details of this section, however, shows that its provisions are unadapted to Chinese seamen, whom the necessities of commerce might require to be shipped, not merely in China, but in other ports of Asia or Europe—as in Calcutta, where this petitioner was shipped—and that some of the requirements of this section in respect to the certificate would be either impossible or wholly impracticable. As I have said, since seamen do not come to the United States as laborers, they are not, as a class, included within the treaty or the intent of the Act. Section 6, the general purpose of which is to ascertain the persons who may come within the United States, ought not to be so interpreted as to prevent the coming of those who are in reality entitled to come, by imposing impossible or impracticable conditions. *Lex non intendit aliquid impossibile.* In *United States v. Kirby*, (7 Wall., 486,) the Supreme Court say: “General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.” Considering, therefore, the specific purpose of the Act itself, the limitations of the treaty, the impracticability of applying section 6 to Chinese seamen shipped in all parts of the world, and the clear omission of sailors from section 8, where we should naturally expect to find them specified, if intended to be referred to at all in this Act, I conclude, on the whole, that they should not be deemed to be embraced within even the general words of section 6. (*Chew Heong v. United States*, 112 U. S., 536.)

Should a Chinese person coming here and landing as a seaman remain for any other purpose, or engage in the labor of the country, he would plainly become amenable to the provisions of the Act. The petitioner in this case left the ship, apparently, unnecessarily. The captain intended to procure him a return voyage. He had, however, had some difficulty with

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the captain, and was suspicious of him and of his intentions. The record before me states his present intention to return as soon as possible; but it does not expressly state his intention when he left the ship. As it is possible, though, I think, hardly probable, that he had some other intention than to ship at once on a return voyage, when he came ashore, I shall order his discharge upon his own recognizance, in the sum of \$500, to ship upon a voyage to some foreign port, within thirty days, without considering the effect of his shipment on board an American vessel, as a British subject, before the passage of the amended Act of 1884. (*United States v. Douglas*, 17 *Fed. Rep.*, 634; *In re Ah Lung*, 9 *Sawyer*, 306.)

James P. Davenport, for the petitioner.

Elihu Root, (*District Attorney*), and *H. N. Tift*, for the United States.

HIRAM B. EVEREST

vs.

THE BUFFALO LUBRICATING OIL COMPANY, LIMITED. IN
EQUITY.

In a patent suit, in equity, founded on two patents, the plaintiff, at the hearing, withdrew one of them, and had a decree on the other. The defendant applied for a rehearing, on the grounds, (1) that he supposed the main reliance was on the patent withdrawn; (2) that the defendant supposed the patent that was sustained, to be invalid; (3) that important considerations as to that patent had failed to come to the attention of the Court: *Held*, that a rehearing must be denied.

(Before COXE, J., Northern District of New York, November 29th, 1884.)

A rehearing (20 *Fed. Rep.*, 848) was asked by the defendant upon the following grounds: First. That, the complainant

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having declared upon two patents known as the "distillation" and "fire-test" patents, and having, on the argument, withdrawn the former from the consideration of the Court, the defendant was taken by surprise, supposing that the main reliance of the complainant would be upon the patent thus abandoned. Second. That little attention was given, in the progress of the cause, to the fire-test patent, (the one sustained,) for the reason, that it was believed by the defendant to be invalid, for want of invention, and the effort of the defence was, therefore, mainly directed to the overthrow of the distillation patent. Third. That considerations of an important and controlling character, bearing upon the construction of the fire-test patent and the defence of lack of invention and novelty, have failed to come to the attention of the Court.

Corlett & Hatch and James A. Allen, for the petitioner.

T. G. Outerbridge, for the plaintiff.

COXE, J. The defendant does not present a case for a rehearing. The petition, when analyzed, is reduced to two main propositions—first, the defendant erroneously assumed that the complainant would not make a serious effort to sustain the fire-test patent, and was thus misled; and, second, the construction placed upon the patent by the defendant is the correct one, and the Court should have taken this view, holding the patent void for want of novelty. Neither is sufficient. There would be no end to litigation if a party could obtain a new trial by the simple assertion that the conduct of his adversary's counsel upon the argument was different from what he had anticipated, and that he was surprised because the attack came from an unexpected quarter.

It will be observed, that the defendant nowhere alleges that the complainant or his counsel said or did anything to mislead, or to induce the belief that they did not intend to rely upon the fire-test patent. Neither can it be successfully

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maintained that the defendant's mistake in this regard influenced it to relax its efforts. There is no pretence that evidence has been omitted or overlooked, that new proof could now be introduced, or that the defence could be strengthened in any way.

If it could be shown that the Court had mistaken the facts, or manifestly misapprehended the law, it might be sufficient for a rehearing. But the fact that the defendant and his counsel think the decision erroneous is not enough; for, unfortunately, it seldom occurs that the Court and the counsel for the unsuccessful party are in perfect accord in their views regarding the case. For errors in judgment ample remedy is provided by appeal.

I think I am correct in saying that no new proposition is now advanced. Every point was pressed upon the Court with much learning and ability, in an argument occupying several hours, and was carefully considered, before a conclusion was reached. The opinion then formed has remained unchanged. It was expressed not without hesitation. I thought it a doubtful case. I think so still. But I am also convinced that it is peculiarly a case where the doubt should be resolved in favor of the patent.

Rehearing denied.

Fargo v. Redfield.

JAMES C. FARGO, AS PRESIDENT OF THE AMERICAN EXPRESS
COMPANY

vs.

TIMOTHY P. REDFIELD, DUNCAN MCINTYRE AND WILLIAM
FARWELL, AS TRUSTEES, AND T. A. MCKINNON, AS MAN-
AGER, OF THE SOUTHEASTERN RAILWAY. IN EQUITY.

The principles laid down in *Express Cos. v. Railway Cos.*, (3 *McCrary*, 147,) approved and applied.

The defendants' railroad was one-fifth in Vermont and four-fifths in Canada. A Vermont corporation, owning the part in Vermont, leased it to a Canadian corporation, owning the part in Canada, and the latter mortgaged the whole, to three trustees, defendants, two residing in Canada and one in Vermont, who took possession for breach of the mortgage. On a bill filed in the Circuit Court for Vermont, by an express company, to obtain accommodation for its business, over the road, at reasonable rates : *Held*,

- (1.) The matter, as regarded the part of the road in Canada, must be left to be dealt with by the Courts of Canada ;
- (2.) The plaintiff was entitled, on giving security, to an injunction restraining the defendants from interfering with the facilities accorded to the plaintiff on the defendants' road within Vermont, and from refusing to transport thereon the messengers and matter of the plaintiff for reasonable compensation, to be agreed upon or fixed by the Court.

(Before WHEELER, J., Vermont, November 29th, 1884.)

WHEELER, J. The principles laid down by Mr. Justice Miller, in *Express Cos. v. Railway Cos.*, (3 *McCrary*, 147,) must be, and are, fully recognized as authoritative, in this class of cases. No real question is made about their general correctness. The principal controversy is in respect to their application to the circumstances of this case. The principal line of the defendants' railway, over which the orator claims the right to do express business, lies about one-fifth in Vermont and four-fifths in Canada. The part in Vermont belonged to a Vermont corporation ; the part in Canada to a Canadian corporation. The Vermont corporation leased its road to the

Canadian corporation for ninety-nine years, and the Canadian corporation mortgaged the whole to the defendant-trustees, two of whom reside in Canada and one in Vermont, to secure mortgage bonds, and the trustees are in possession for breach of the condition of the mortgage. The other defendant is their manager of the whole.

It is argued for the defendants, that no relief can be granted here because the accommodation of express companies by railroad companies in the Province of Quebec, where the Canadian portion of this railroad lies, is regulated by statute, which would cut the rights of the orator down to what the defendants are willing to afford; that the Court here has no jurisdiction over the enforcement of rights to accommodation on railroads in Canada; and that any attempted relief as to the part in Vermont would be ineffectual, on account of the connection of that part with the part in Canada, and should not be undertaken.

The orator insists that the statute does not materially alter the common law as to the rights in question, and that, as the relief now sought by injunction is strictly *in personam*, and the parties are now before this Court, the relief may properly be granted as to the whole line, the same as if it was wholly within this territorial jurisdiction.

The statute relied upon does not appear to much, if any, vary the rules of the common law upon the subject. It merely provides that any railway company granting any facilities to any incorporated express company shall grant equal facilities, on equal terms and conditions, to any other incorporated express company demanding the same. (*Stat. Quebec*, 43 & 44 *Vict.*, chap. 43, sec. 59, cl. 3.) This is almost identical with the 5th proposition laid down by Mr. Justice Miller, except that he applies the doctrine to all engaged in express business, instead of confining it to incorporated express companies. This statute might not stand in the way of the relief claimed by the orator.

There is no question but that Courts of equity may and do afford relief beyond their territorial jurisdiction, by affecting the persons of parties within it, as by enforcing contracts in respect to land lying out of it. (*Penn v. Lord Baltimore*, 1

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Ves. Sr., 444; *Story's Eq. Juris.*, § 743.) But here the relief sought is not of a private character. The defendants stand upon the rights of, and are performing the duties of, a public corporation in Canada, and of another in Vermont. They do not hold the property as private tenants in common, but are administering a trust involving public as well as private interests. It does not seem proper that the performance of such duties should be enforced by any but the domestic tribunals. The orator has a contract in respect to what is now asked, but an enforcement of the contract is not sought; what is sought by this bill is accommodation for express business over the defendants' road, at reasonable rates. The contract is to be resorted to only as evidence of reasonableness of accommodation and rates. The subject is of such a public character, that so much of it as is without this jurisdiction is left to be dealt with by the tribunals where it is. (*Western Union Tel. Co. v. Pacific Tel. Co.*, 49 Ill., 90; *High on Inj.*, § 33.) The connections between the parts of the road in the different countries might render the affording of relief by the Courts of the other jurisdiction as difficult alone as that of the Courts here; and the same reasons that would restrain this Court within this jurisdiction would restrain those within that. The presumption is, that the Courts there will do full and exact justice to all interests in that jurisdiction, and nothing remains to this Court but to do the same, so far as they are perceived, to the interests involved, within this jurisdiction.

The defendants have a contract with the Dominion Express Company, for doing express business over their lines, at rates greatly in excess of what the orator is paying, and greatly beyond what the orator claims to be a reasonable rate. They offered to contract with the orator upon the same terms, which the orator declined to do, for the reason, as alleged, that the rates would be ruinous, and the defendants have notified the orator to quit their lines, or pay that rate. The orator has no right, and claims none, to interfere with any contract with any other company or person, but appears to have the right to have its agents and parcels transported over the defendants' road

at reasonable rates, to be agreed upon by the parties, or fixed by the Courts. To fix an arbitrary rate, and deny all facilities except at that rate, is a denial of the right, unless the rate is reasonable. The parties differ widely as to what is reasonable, and what might be quite reasonable with only one company doing the business might be very unreasonable if there were more; and what would be reasonable for the whole line might be greatly disproportionate to what would be for a part or parts only. What would be just cannot in any manner be settled in advance. The orator is entitled to the accommodation and facilities without waiting for an adjustment of the rates by the Court, by furnishing security for their payment, when adjusted, by agreement or by the Court. There is no question between the parties as to the solvency of the orator, or of the surety proposed by the orator, in case one should be required. As this subject is now viewed, in view of the case cited, and of the decisions made by the highest Courts as to the duties of common carriers to carry for all at reasonable and just rates, it is considered that the orator is entitled to a preliminary injunction similar to the one granted in that case, as to so much of the defendants' road as lies within the State and District of Vermont.

Let a writ of injunction issue, to restrain the defendants, their managers, agents and servants, from interfering with the facilities now enjoyed by and accorded to the orator on the railroad of the defendants within the State and District of Vermont, and from refusing to receive and transport the messengers and express matter of the orator, for reasonable and just compensation therefor, to be agreed upon by the parties or adjusted by the Court, the orator to be liable for all such compensation, and to file a bond in this cause, in the penal sum of ten thousand dollars, with sufficient surety, to be approved by a master, within twenty days, for further security of the same.

L. P. Poland, for the plaintiff.

Crane & Alfred, for the defendants.

The American Bell Telephone Company v. The People's Telephone Company.

THE AMERICAN BELL TELEPHONE COMPANY AND THE METROPOLITAN TELEPHONE AND TELEGRAPH COMPANY

vs.

THE PEOPLE'S TELEPHONE COMPANY AND OTHERS. IN EQUITY.

Letters patent granted to Alexander Graham Bell, No. 174,465, March 7th, 1876, for "improvements in telegraphy," and No. 186,787, January 30th, 1877, for "improvements in electric telephony," are valid.

Bell, and not Daniel Drawbaugh, was the inventor of the electric speaking telephone.

The claims of Drawbaugh considered with reference to these facts: (1) His failure to apply for a patent for the telephone, for 10 years; (2) His want of veracity, as a witness; (3) His want of acquaintance with electrical science; (4) His failure to bring a telephone into use.

(Before WALLACE, J., Southern District of New York, December 1st, 1884.)

WALLACE, J. This suit is brought to enjoin the defendants from using and furnishing to others for use the several inventions described in two patents granted to Alexander Graham Bell, of Salem, Massachusetts, being No. 174,465, bearing date March 7th, 1876, for "improvements in telegraphy," and No. 186,787, bearing date January 30th, 1877, for "improvements in electric telephony." The issues made by the pleadings are practically resolved into the single question, to which the proofs and arguments of counsel are mainly addressed—whether the patentee Bell, or Daniel Drawbaugh, of Milltown, in Cumberland County, Pennsylvania, was the first inventor of the electric speaking telephone. Concededly, Bell was an original inventor of the telephone, the principle of which with the essential means for its application are described in his first patent, and of the improved apparatus described in his second patent. The fifth claim of the first patent is for "the method of, and apparatus for, transmitting vocal or other sounds telegraphically, as herein described, by

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causing electrical undulations, similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth." This patent has been judicially construed in two cases in the First Circuit; and in both cases it was substantially held, that Bell was the discoverer of the new art of transmitting speech by electricity, and that the claim should receive the broadest interpretation, to secure to the inventor not the abstract right of sending sounds by telegraph without regard to means, but all means and processes described which are essential to the application of the principle. (*American Bell Telephone Co. v. Spencer*, 8 Fed. Rep., 509; *Same v. Dolbear*, 15 Fed. Rep., 448.)

In view of the conclusion reached upon the merits of the issue, it is not material whether Bell's inceptive invention did or did not antedate the time of filing his application for the first patent. That application was filed February 14th, 1876. It describes apparatus which was an articulating telephone, whether Bell knew it or not. Mr. Cross, an expert, caused apparatus to be made in conformity to the description and to drawings as shown in Figure 7 of the patent, which proved itself to be an operative, practical telephone. Probably the date of his inceptive invention might be carried back to July, 1875, but, irrespective of the time of the invention, the justice of his claim to be an original inventor of the telephone must remain unchallenged. It was through him, also, that the telephone was made known to the scientific public, and thence introduced into commercial use.

The defendants contend, that, long before Bell had perfected his invention, and long before its mental conception by him, Drawbaugh had not only made the same invention, but had perfected improvements in organization and detail which Bell never reached, and which were only reached years afterwards by the work of many other inventors in the same field of improvement. Their theory of the facts is stated with substantial accuracy in the answer to the bill of complaint. The answer, among other things, avers that Drawbaugh "was and is the original and first inventor and discoverer of the art of

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communicating articulate speech between distant places by voltaic and magneto electricity, and of the construction and operation of machines and instruments for carrying such art into practice ; * * * that the said electric speaking telephones, so constructed and successfully and practically used by him, contained all the material and substantial parts and inventions patented " in the two patents granted to Bell, and also contained other important and valuable inventions in electric and magneto telegraphy ; " that some of the original machines and instruments invented, made, used and exhibited to many others long prior to the alleged inventions of Bell are still in existence, and capable of successful practical operation and use, and are identified by a large number of persons who personally tested, and used, and knew of, their practical operation and use, in the years 1870, 1871, 1872, 1873, 1874, and both subsequently and prior thereto ; * * * that said Drawbaugh, for more than ten years prior to 1880, was miserably poor, in debt, with a large and helpless family dependent upon his daily labor for support, and was from such cause alone utterly unable to patent his said invention or caveat it, or manufacture and introduce it upon the market ; and that said Drawbaugh never abandoned or acknowledged the claims of any other person thereto, but always persisted in his claim to it, and intended to patent it as soon as he could obtain the necessary pecuniary means therefor."

Drawbaugh, in his testimony, adopts the statements of the answer as true. He also testifies, that he commenced his experiments with the electric telephone as early as 1866 ; that, prior to or as early as in 1867, he had made apparatus, (in which he employed a tea-cup as the transmitter,) through which speech could be transmitted feebly and incoherently ; and that, as early as the time of the birth of his son Charles, he had so progressed, that his wife, who was then confined to her bed, could, by listening with one of his instruments, hear the words spoken by him in the other instrument, in a distant part of the house. His son Charles was born in 1870, and, if

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Drawbaugh's narrative is true, he had succeeded at that time in transmitting speech distinctly through the instruments, although whispered words would not be accurately heard. He describes instruments which, he says, were made by him from time to time, as experiments led him from one improvement to another. He testifies, that he thinks he made his first telephone apparatus prior to November, 1866, and is positive he had it before he moved his shop to the "Clover-Mill," in 1867. As he describes it, the body of the transmitter was a porcelain tea-cup, the diaphragm was of membrane, the electrodes interposed in the circuit were two copper disks, the upper one of which was connected to the diaphragm by a wire, so as to vary its pressure upon a low conductor of fine earth or pulverized charcoal, interposed between the disks, through the action of the sound waves upon the diaphragm; and the receiver was a tin can, without a top or bottom, having a membrane diaphragm stretched over one end, connected by a tense cord to an armature supported on a spring, and arranged close to the poles of an electro magnet in the electric circuit. He testifies, that, subsequently, he constructed apparatus upon the same general principle, with some change of detail; and he produces Exhibits "F" and "B,"—the former a transmitter and the latter a receiver—as the remnants of the original instruments. Exhibit "F" is a glass tumbler; and he states that at first he used a membrane diaphragm over it, and then one of thin metal; and that for the conductor he used pulverized carbon, or carbon mixed with bronze powder, and used various tops or mouthpieces to speak into it. The Exhibit "B," he says, was the receiver; and in this he had discarded the string and the spring of his earlier receiver. He says that experiment led him to improve the transmitter "F," by substituting a metal diaphragm in place of membrane, and he produces a sketch. A reproduction of this instrument has been made by him for use in the proofs, which is designated as "Exhibit F reproduced." In this the mouthpiece is modified in size, and in distance from the diaphragm. He made, according to his testimony, a new receiver of more perfect

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construction, and produces the remnant of the original, which is designated as "Exhibit C." As he describes the instrument, it was a decided advance upon the former receiver. In using this, he says he tested it also as a transmitter, with some success, and then improved it, by placing a permanent magnet against the heel of the electro magnet, and thus made a magneto telephone. A reproduction of such an instrument as he describes is made, and referred to in the proofs as "Exhibit Reproduced C." After Exhibit "C," he produces Exhibits "I," "A," "E" and "D," as likewise original instruments, made respectively in the chronological order of their production as exhibits. He states that "I" was used by him as a companion instrument to "C." Exhibit "A" discloses a modification of form and a higher degree of mechanical adaptation. The last two, "D" and "E," are concededly perfect, practical instruments; and, according to the testimony of Mr. Benjamin, an expert witness for the defendants, would compete successfully for public patronage with any magneto telephone which had been introduced into use in 1882. It is asserted of these instruments, by counsel, that no higher development of the magneto telephone has been reached at the present time than is indicated by Exhibits "E" and "D." Drawbaugh does not attempt to fix the time at which he made any of these instruments, or even the year. He testifies, however, that he made all of them prior to the time the "Axle Company" commenced business, which was in December, 1874, except "E" and "D," which were made about that time. The theory of the defendants is, that Exhibits "F" and "B" were used by Drawbaugh in 1867, 1868 and 1869, Exhibit "C" in 1869 and 1870, Exhibit "I" in 1870 and 1871, Exhibit "A" in 1873 and 1874; and that Exhibits "E" and "D" were made in January or February, 1875, although cruder instruments, essentially similar, were made somewhat earlier. It is in proof that thirty-three patents were granted for improvements in telephones in 1878, sixty-four in 1879, more than one hundred in 1880, and ninety-four in the first six months of 1881. According to the theory of the defendants, there-

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fore, as early as February 1875, Drawbaugh had not only distanced Bell in the race of invention, but also Gray and Edison, and had accomplished practically all that has since been done by a host of other inventors. The case for the defendants must stand or fall by this theory. The proofs leave no room for fair doubt that the defendants' contention is substantially true, or that the defence has no foundation in fact. It is either true that Drawbaugh had long been treading his solitary path of investigation and experiment in poverty and obscurity, but had perfected his work when the inventions of other explorers were in embryo, or his story is an ingenious fabrication. And, as will hereafter appear, if the defence is a fabrication, many disinterested witnesses have contributed innocently to give it color and strength; but Drawbaugh has deliberately falsified the facts.

The complainants start with the benefit of the presumption of law, that Bell, the patentee, was the inventor of that for which the letters patent were granted him. Whoever alleges the contrary must assume the burden of proof. Evidence of doubtful probative force will not overthrow the presumption of novelty and originality arising from the grant of letters patent for an invention. It has been frequently held, that the defence of want of novelty or originality must be made out by proof so clear and satisfactory as to remove all reasonable doubt. (*Washburn v. Gould*, 3 *Story*, 122; *Smith v. Fay*, 6 *Fisher*, 446; *Hawes v. Antisdel*, 2 *Bann. & Ar.*, 10; *Patterson v. Duff*, 20 *Fed. Rep.*, 641; *Wood v. Cleveland Rolling Mill Co.*, 4 *Fisher*, 550; *Parham v. American Button Hole Co., Id.*, 468.) In *United States Stamping Co. v. Jewett*, (18 *Blatchf. C. C. R.*, 469,) Blatchford, J., said that the defendant had not fulfilled "the necessary obligation of showing beyond any reasonable doubt" that Weber (the alleged prior inventor) was prior to Heath (the patentee). In *Coffin v. Ogden*, (18 *Wall.*, 120,) Mr. Justice Swayne, delivering the opinion of the Court, stated the rule applicable to the defendant as follows: "The burden of proof rests upon him, and every reasonable doubt should be

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resolved against him." To overthrow this presumption and disprove that Bell was the first inventor, the defendants introduce the testimony of nearly two hundred witnesses, tending to prove the priority of invention by Drawbaugh. As the complainants concede that Exhibits "E" and "D" are highly organized, practical, telephone instruments, and fully capable of perfect articulation, the patents are invalidated if these instruments were in existence at the date of Bell's invention; and, as will hereafter appear, either they were in existence as early as in 1875, or it is incredible that they existed at all until long after Bell's first patent had been granted, and his invention had attracted general public attention at the Centennial Exposition and elsewhere.

In the argument for the defendants, great stress is placed upon the evidence of a gradual and natural development of Drawbaugh's invention, shown by the original instruments produced, beginning with Exhibit "B," and ending with the perfect magnetos "E" and "D." It is strenuously urged, that these exhibits fortify his testimony describing the instruments no longer extant, and mark the origin and culmination, beginning with the cup machine and Exhibit "F," of two separate lines of invention—one leading to the battery telephone, in which the undulatory vibrations are controlled by variations in the resistance of the circuit; and the other to the magneto telephone, in which the vibrations are created in the act of producing the current itself. The general theory of the defence is substantiated by three classes of witnesses—those who heard of the existence of Drawbaugh's "talking machines" at various times; those who talked through the machines on various occasions, or heard others talk through them; and those who attempt to identify one or more of the exhibits as the instruments they saw used. Only an outline of their testimony will be given.

More than fifty witnesses testify to having heard of the talking machines prior to February 14th, 1879. Of these witnesses, three think they heard of them in 1869; three in 1870; two in 1871; five in 1872; three in 1873; three prior

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to 1873; eight in 1874; two in 1875; from 1866 to 1876, one; from 1868 to 1871, one; from 1868 to 1873, one; from 1869 to 1870, one; from 1869 to 1876, one; from 1871 to 1872, two; from 1872 to 1873, one; from 1873 to 1874, one; from 1873 to 1875, three; from 1874 to 1875, one; from 1874 to 1876, one; from 1872 to 1876, one; prior to 1869, one; prior to 1872, two; prior to 1875, one.

Sixty witnesses do not attempt to identify any particular instrument, but testify that they saw a talking machine, or talked through it, or heard it talked through, at Drawbaugh's shop, on occasions subsequent to 1867, and most of them fix the occasion as prior to 1876. The substance of the testimony of some of them will be given.

Wilson G. Fox testifies, that he saw the talking machine at Mr. Drawbaugh's shop about the year 1867 or 1868, when the old Faucet Company was in operation there. Prior to March, 1871, the witness was employed in the carding room of the Harrisburg Cotton Mill, and Drawbaugh came there to get material to wrap his wire to use for the talking machine. Henry Bonholtzer testifies, that he was at Drawbaugh's shop in 1869, and saw talking machines there. Margaret Brenne-man testifies, that she saw the talking machines at Drawbaugh's shop in 1869. Abraham May testifies, that he did work on Daniel Hart's house at Milltown, in August and September, 1870, of which he produces his account books; that he never did any work for Daniel Hart after that; that, while doing that work, he was at Drawbaugh's shop, to get a boring machine mended, which he was using in the work, and Drawbaugh showed him his talking machines, and talked through them from one floor of the shop to another. The witness understood and heard through the machine the words that Mr. Drawbaugh spoke into it. His testimony is corroborated by Jacob H. Kilmore, William H. Martin, and John A. Smith.

Cyrus Orris testifies, that he saw Drawbaugh's talking machines at different times, from about the 1st of April, 1871, down to 1880, and took his son-in-law, Jacob E. Smith, to Drawbaugh's shop, to see the machines, about April 1st, 1871.

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Benjamin K. Goodyear testifies, that, in 1871, he seized the personal property of George W. Kissinger, of Milltown, upon an execution issued November 13th, 1871; that, on December 4th, 1871, the attached property was appraised, and on that day witness went to the workshop of Daniel Drawbaugh, to find J. B. Drawbaugh, to summon him as an appraiser, and had to wait for him there a short time; that, while waiting there, Daniel Drawbaugh showed him his talking machines, and talked through them to him, and witness heard him speak, and understood distinctly the words that he spoke, through the instrument; and that he was never in Drawbaugh's shop afterwards, so far as he can recollect.

George Natcher testifies, that he lived at Milltown in 1871, 1872, and never has been in the town since August 9th, 1872; that, while living there, he was at Drawbaugh's shop, and saw and talked through the talking machines on different floors, and listened at the same machine and understood what was said through it. Mrs. B. B. Spangler, a sister of George Natcher, testifies, that she moved away from Milltown in 1872, and never has been there since; that she talked into Drawbaugh's talking machines while she lived there; and that she was so small that Harman Drawbaugh had to lift her up to enable her to talk into the machine. Mrs. Mary Free testifies, that she was with her sister, Mrs. Lydia Drawbaugh, at Drawbaugh's shop, in September, 1872, when he talked through the machines to them, and she remembers hearing through the machines, "Good afternoon, ladies!" Drawbaugh told them that the machines operated by electricity.

Mrs. Lydia Drawbaugh testifies, that she saw the talking machines in September, 1872, her sister, Mrs. George Free, being present. David M. Ditlow testifies, that he saw Drawbaugh's talking machines about 1872, when Drawbaugh talked through it, and witness heard and understood through the machine what he said. David K. Earnest testifies, that he was at Drawbaugh's shop, with John B. Bloser, about the middle of June, 1872, and talked with Drawbaugh about the

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talking machines, and thinks he saw them at that time. This testimony is corroborated by John Bloser. N. W. Kahney testifies, that he saw the talking machines about 1872. William H. Martin testifies, that he was at Milltown with John Keefauver, to get George Hosler to make him a pair of boots. Hosler lived at Milltown only from March, 1872, to March, 1873. At that time witness and Mr. Keefauver went down to Drawbaugh's shop, and talked through the talking machine, from the basement to the attic, and heard and understood what was said through the machine. They talked and listened at the same instrument.

John F. Keefauver corroborates Mr. Martin, and also states that he talked through Drawbaugh's talking machine with Jacob M. Sadler, in April, 1873, prior to the death of George B. Hick, and that, about two or three years before he saw the talking machines, he had heard a good deal about them, and first heard of them at a place seven miles west of Carlisle. William W. Snyder testifies, that he was at Drawbaugh's shop, on Wednesday, February 5th, 1873, and saw the talking machines. He verifies the date by an entry in his diary. Jacob Barber testifies, that he was a candidate for the office of County Commissioner of Cumberland County, in the summer of 1873, and, in connection with his canvass, went to Drawbaugh's shortly after the death of George B. Hick. While at Drawbaugh's shop he saw the talking machine, and was never in the shop after July or August, 1873.

Ezekiel Worley testifies, that, about the year 1873, he saw the talking machines at Drawbaugh's shop. His statement is corroborated by John K. Taylor. Abraham Ditlow testifies, that he knew of Drawbaugh's talking machine in 1874, and saw it and talked through it at that time. He had forgotten the fact, but was reminded of it by Mr. Alexander Milner, of Porter County, Indiana, whom witness told about it in May or June, 1876, in Indiana. William Eppley testifies, that he visited Drawbaugh's shop for the last time in May or June, 1875; that he was there several times during the two years preceding that period, and had seen talking machines. Jona-

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than Fry testifies, that he was at Drawbaugh's shop with Mr. Hamme and Mr. Frederick, in the winter of 1875-6, and saw the talking machines there. Jacob Evans testifies, that he was at Drawbaugh's shop with his wife, his brother Andrew, and his sisters Margaret and Sarah, about December 1st, 1875, and saw and talked through the talking machines.

Henry L. Hamme testifies, that he was at Drawbaugh's shop either in the last of January or the beginning of February, 1876, in company with George Frederick and Jonathan Fry, and saw and talked through the talking machine at the time; that he heard and understood very plainly what was said through the machine, even when Mr. Drawbaugh talked in a whisper. George Frederick testifies, that he was at Drawbaugh's shop with Mr. Hamme and Mr. Fry, in January or February, 1876, and saw the talking machine. S. S. Rupp testifies, that he was at Drawbaugh's shop with Mr. Hammacher and his scholars, on February 1st, 1876, and recollects that Mr. Drawbaugh at that time spoke about a machine that he had which he called a talking machine, but the witness was interested in other things and did not pay much attention to it. George H. Bowman testifies, that he saw talking machines in Drawbaugh's shop in February, 1876, at which time somebody was talking to Mr. Drawbaugh through them. Charles L. Drawbaugh testifies, that he saw and talked through the talking machines at Drawbaugh's shop a year or more prior to May 1st, 1876, and heard and understood what was said.

The third class of witnesses are those who identify, more or less positively, one or more of the several exhibits, as the instruments used by them, or which they saw used by others, prior to March 7th, 1876. Exhibits "F" and "B" are identified by the following witnesses: Brooks saw them in 1874; Smyser, in 1872; Eberly, before December, 1870; Wagner, in the fall of 1874; Freese, in 1869 or 1870; Yetter, about Christmas, 1875; Fry, spring of 1875; Carl, in 1870; Scherick, in 1869; Balsley, between 1870 and 1874; Good, before 1872; Kahney, in 1871 or 1872; Schettel, about 1872; Nichols, in 1875; Renneher, in May, 1875; Weber, late in 1874;

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Stephen, before 1875; Shireman, about 1872; Hawn, about 1872; H. B. Eberly, in May, 1873; J. C. Smith, between April, 1872, and April, 1873; Sternberger, in October, 1871; Fettrow, in April, 1876; Halsinger, prior to 1876; Shoop, in 1869; H. F. Drawbaugh, in 1872; Zimmerman, in 1871; Bates, in 1874; Guistweit, in July, 1870; Hale, in fall of 1873; Stone, in June, 1871; Free, in June, 1872; J. A. Oyster, in June, 1875; Harmon K. Drawbaugh, in January, 1871; J. B. Drawbaugh, in 1869; G. W. Drawbaugh, in 1870; Lenseman, in July, 1871; Fisher, in 1868 or 1869; Hubler, in fall of 1873; Updegraff, in 1874; W. H. Decker, in 1873; and a number of other witnesses saw one of these two exhibits.

The identification of Exhibits "C," "I" and "A" is made by a smaller number of witnesses. Some of them think they saw "C" in 1870, and others at various dates after that, and as late as March 1876. One of the witnesses thinks he saw "I" in 1871; the others locate the occasions in 1873, 1874 and 1875. Some of the witnesses think they saw "A" as early as 1872, one of them in 1870; but most of them saw it, they think, in 1875.

Exhibits "E" and "D" resemble each other very closely in appearance, and most of the witnesses produced to identify them saw both at the same time. They locate the time as follows: Fry, laborer, in May or June, 1875; Fry, farmer, in April, 1875; Bayler, in June, 1873, (Exhibit "D"); Springer, after April, 1876; Shettel, about 1875; Shoop, after February, 1877; Musser, in June, 1876, (Exhibit "D"); Millard, in 1875; Holsinger, in summer of 1875; Shoop, in 1874 or 1875; Bates, between 1874 and 1877; Dellenger, in March, 1876, (Exhibit "E"); Guistweit, between 1870 and 1876; Bowen, in September, 1878; Hale, in fall of 1875, (Exhibit "D"); Michael Dillinger, in November, 1877, (Exhibit "D"); Harmon K. Drawbaugh, in January, 1875, and helped put up wire for them; J. B. Drawbaugh, prior to January 26th, 1875; George W. Drawbaugh identifies all the exhibits as seen by him some time between 1871 and 1878; Updegraff

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and Musser, in 1876; Smith, in 1872 or 1876, (Exhibit "E"); May, in 1876, (Exhibit "D"); J. H. Smith, in May, 1876, (Exhibit "D"); Decker, in 1874, (Exhibit "D"); Vannandale, in February, 1875; Evans, in fall of 1875; Mrs. Erb, in fall of 1875; S. E. Evans, in fall of 1875, (Exhibit "D"); M. E. Evans, in fall of 1875, (Exhibit "D").

Some of the witnesses who identify exhibits identify the whole series. Other witnesses besides those named identify one or more of the exhibits as seen by them at times subsequent to the date of Bell's application for his patent. Some of the witnesses who identify one or more of the instruments exhibited to them by Drawbaugh as the Exhibits "F," "B" or "C," saw or used them in 1875 or 1876. Among these are the following, to whose testimony a reference will be made: Mr. Springer testifies that he repeatedly talked and listened with Drawbaugh through the instruments, after the 1st of April, 1876, using Exhibits "F" and "B" as the instruments. Mr. Musser testifies, that he talked through "F" and "B" in June, 1874; but the proofs show that this occasion was as late as in the summer of 1876. Mr. Moore, who is produced to show that Drawbaugh applied to him to acquire an interest in the invention, testifies, that the talking machine which Drawbaugh produced was Exhibit "B." This was in May, 1875. Mr. Bayler testifies, that he talked through "F" and "B" in 1873; but the proofs show that the occasion was between 1875 and 1877. Mr. Nichols locates the middle of January, 1875, as the time when he saw Exhibit "B" in use.

That the talking machines referred to by the witnesses were electric instruments is clearly established. Drawbaugh testifies explicitly that they were always used with a closed circuit, and without breaking the current, some of them being battery telephones, and some magneto telephones. He always represented them as actuated by electricity, to those to whom he explained or described them, and claimed his invention would supersede the telegraph. His assertions show them to have been electrical instruments. He stated to the witness Shank, "it was the greatest invention ever known. If he had

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the means to go on with it, they could talk, or rather be a time to come as to talk, to the old country, same as we can talk here." To Zacharias, that "he could run it out for miles, and parties could talk in at one end and be heard at the other end, the same as persons in a room together." To Smith, that "parties between Harrisburg and Philadelphia could communicate as if they were speaking together; there would hardly be any limits;" it was an "instrument to convey the voice, to supply the place of the telegraph;" to Smyser, that it would work "from here to California;" to Fry, that one "can talk as far as the wire goes;" to Carl, that "he could hear a man talk from that place to New Cumberland or Harrisburg, and understand distinctly what he said;" to Sherwick, that it was "better and handier than the telegraph; that you could just talk through it in place of writing;" to Balsley, that, "by attaching two wires you can hear it away off; the telegraph is nowhere with it;" to Kahney, that "he could talk the same for miles as he could for a short distance;" to Shettel, that, "if he had a wire from the shop in connection with the telegraph wires at White Hill, he could talk to Mechanicsburg, by having a machine there or an instrument in the office; that it would be better than telegraphing, and that it would be worth a great deal of money;" to Reneker, that "he thought he could make it that he could talk through to Harrisburg; he thought they would take the place of telegraphing;" to Weber, that "it beats all the others of my inventions; he could carry sound, or rather talk, as far as Shiremanstown;" to Hawn, that "he would be able to operate, that a man preaching in New York, that a congregation in Philadelphia would hear the same sermon;" to Kahney, that "he could just as easy speak ten miles as one, or any distance he would choose to;" to Rupp, who was there with Hamacher, that "it was worked by electricity, would take the place of the telegraph; and that he could make it so that he could talk to San Francisco;" to Musser, that "he was going to make a machine to talk from Harrisburg to Philadelphia, and it would be cheaper and quicker way than telegraphing;" to

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Smith, that "he believed they could talk for a hundred miles;" to Fettrow, that "I could speak ten, fifteen or twenty miles, or even to California, if there was a wire extended;" to Wisler, that "he could attach a wire to it and talk for ten miles, as far as he could have a circuit around;" to H. F. Drawbaugh, that "he could talk across the continent;" to Free, that "the talking machine could be used to talk at a long distance—from Philadelphia to California;" to Landis, "that it could be used a thousand miles; it would take the place of the telegraph;" to Lenig, that "he could talk hundreds of miles through that;" to Updegraff, that, "instead of using the old mode of telegraphing, he could talk directly through the wire; he thought he could talk as far as you could use the ordinary telegraph wire;" to Draper, that "he thought it was, or would be, one of the greatest inventions of the age, and would take the place of telegraphing;" to A. Evans, that "he could take this machine and talk clear out to Europe, cross the ocean;" to Eicholz, that "if he could only get some one to help him once, he would run it to Harrisburg, and convince them, and then he would run it from Harrisburg to Philadelphia." He stated to the witness Shank, that "it works by electricity;" to Smith, "it was by electricity;" to Nichols, that "the sound was conducted by electricity;" to C. Eberly, that the instruments were "to convey sound by electricity;" to Coudry, that "they were operated by electricity;" to Shoop, that "it operated by a battery;" to Shireman, that "they operated by magnetism;" to Hawn, that "they would be operated on by a battery;" to N. W. Kahney, that "the machine was operated by electricity, by a battery;" to Zimmerman, that "it was electricity that would pass it over the wires; that it would carry the sound right along;" to Hale, that "it was driven by a magnet;" to H. K. Drawbaugh, that "the sound could be carried to a distance on a wire by the use of electricity;" to Lenig, that "electricity was used in connection with it;" to Prof. Heiges, that, "in connection with a talking machine, both magnetism and electricity were applied;" to

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Goodyear, that "his talking machine was also done by electricity over wires;" to Woods, that "it was to be an electric machine used in place of telegraphing;" to Young, that "it was an electric talking machine, which he had invented."

Thus Drawbaugh is corroborated by a cloud of witnesses whose testimony tends to substantiate his narrative. Without stopping at this point to consider the credibility and probative force of their testimony, it suffices to state, that, although some of the witnesses seem to have been reckless and unscrupulous in their statements, the great body of them are undoubtedly honest witnesses. It is impossible, however, to believe that Drawbaugh can be mistaken in the substance of his testimony, and the conclusion cannot be ignored, that either his testimony is true in its essential parts, or his narrative has been manufactured to fit the exigencies of the case. In order to ascertain what effect is to be given to the corroborative proofs, it is important to determine whether Drawbaugh is an honest witness, or whether he has intentionally falsified collateral facts, and is, therefore, to be deemed discredited. If the defence is to be believed, he had been experimenting with his talking machine from 1866, and had successfully transmitted speech as early as 1870, if not before that time. He testifies, that he had used Exhibits "B" and "F," in transmitting speech, for two or three years before he made Exhibit "C." According to the theory of the defendants, Exhibit "C" was made in 1869 or 1870. At that time he had reached a secondary stage in the development of his invention, and certainly as early as in 1872, when Exhibit "C" had received its latest modifications, the invention had passed out of the period of rudimental forms embodying principle merely into a form embodying nice details of construction, and had reached a perfection not reached by Bell in his earlier patent. Drawbaugh was well aware of the merit and of the great pecuniary value of the invention; he had obtained patents for several inventions of minor value; yet from 1870 until July 1880, he did not apply for a patent for the telephone. It was of the first importance to explain the reason of his inaction,

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because it seems incredible that the inventor of the telephone should not only omit to patent it as soon as he could, but should also remain silent for years after others were winning the fame and profits of the invention. Only one explanation was possible, and that has been attempted. As stated in the answer, and in his testimony, it is that he was unable to do so by reason of his poverty. The answer alleges, "that, for more than ten years prior to 1880, he was miserably poor, and utterly unable to patent his invention or caveat it." He was asked the question: "Do you mean to have it understood, from your last answer, that there was any other reason, for some period prior to 1870, except your poverty, whether greater or less, which prevented you from patenting your invention, or filing a caveat for it?" His answer was: "If I understood that right, there was no other reason that I can think of now." He proceeds to state that Exhibits "F" and "B" exhibited the principle perfectly enough to patent.

In the elaborate efforts of the defendants to substantiate the theory of Drawbaugh's inability, from poverty, to patent his invention, much testimony has been produced to show, and which does show, that he was always more or less in debt, often a borrower of small sums of money, was dilatory in paying his debts, and used to plead his inability when dunned, and was often sued, and judgments and executions were obtained against him; but it is clear, from a few plain facts, that the theory of extreme poverty is unfounded, and that Drawbaugh is dishonest in putting it forward. In 1867 and 1869, besides what he received for his wages, he received \$5,000 from the Pump Company, for his faucet invention, besides \$1,000 in the stock of the concern. On the 1st day of April, 1869, he received \$1,000 from one Gardner, for the sale of a half interest in a faucet invention. He invested \$2,000 of the \$5,000 in real estate, lost \$400 of it in an apple speculation, and used the \$1,000 received from Gardner to buy a house and lot for his father. Between 1867 and 1873 he paid \$1,200 to the Drawbaugh Manufacturing Company, for assessments on his stock, besides \$870 in labor; and in July, 1873, received from

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that company \$425 cash, in settlement of its affairs. From 1867 to April, 1872, he was the owner of real estate, for which he had paid \$2,300 in the fall of 1867, and upon which he expended in improvements, in the spring of 1868, from \$300 to \$400, and which was encumbered only by a prior lien for \$300. In the spring of 1872, he encumbered it for \$1,000, not as a principal, but as a surety. He was in receipt of \$110 annually, as rent, for a part of this property, occupying the rest himself, until he sold it in 1876, and bought another house in the town of Mechanicsville. He was always in receipt of fair wages for his labor. From April 1st, 1875, to April 1st, 1876, he received nearly \$450, for wages, from the Axle Company, irrespective of his earnings from other sources, and declined steady work at times, because he could make more by job work. Thus it appears, that, although, at times, it was not convenient for him to pay his debts, or he was careless or indifferent, he had not only the means of raising money during all this period, but that, on many occasions, he had means for investment and for speculation. The pretence that he could not raise the fees to caveat or patent his invention is transparently absurd. He was accustomed to prepare specifications of patents, and was a maker of models, and advertised himself as an inventor, designer and solicitor of patents. During the time he was experimenting on his talking machine, and before he applied for a patent, he found time and materials for experimenting with and making the Giffard injector for steam engines, the autograph telegraph, the magneto dial telegraph, the magneto key, the automatic fire alarm, and the electric clock. During this period he was a friend of Mr. Weaver, a patent solicitor, who frequently gave him advice and professional assistance, in return for mechanical services rendered by Drawbaugh, and who drew specifications for him for a measuring faucet, and for the magnetic clock. If he was not competent himself to make an application for the patent, it cannot be doubted, that, with the assistance of Weaver, he could have made a proper application at a trifling outlay, if any, beyond the fees of the office.

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Drawbaugh devoted a good deal of time, between 1867 and 1878, to the invention and construction of his electric clock; and the time and money expended by him in experimenting and constructing this clock in its various forms, especially those made in 1877, 1878, was much more than would have enabled him to patent his talking machine. These clocks were built by him with his own tools and out of his own money, and to build them economically he made a gear-cutting machine, which must have cost him more than it would to patent his telephone. In April, 1878, he received \$500 from the Electric Clock Company, for the privilege of using his clock invention.

In order to fortify the theory of Drawbaugh's inability, from poverty, to patent his invention, the defendants have attempted, by testimony from him and from others, to show that he was extremely solicitous to patent it, and tried to induce others to furnish the means. Mr. Springer testifies, that "his (Drawbaugh's) whole mind appeared to be on his talking machine. He told me that many a night he didn't sleep, just studying how to improve it." After May, 1872, according to the testimony of Jacob Hawn, the talking machine superseded the clock, in Drawbaugh's interest. According to Mr. Holsinger, from 1873 to 1876 "he appeared to be crazy on it. I often tried to get information from him on other subjects, and about half a minute's talk would turn him right on the talking machine." Henry F. Drawbaugh, his brother, testifies: "Every time I was down there, from the summer of 1872 to 1879 or 1880, he was working at it, and talking, and wanted me to go in with him, and furnish means." Mr. Bates says he was in Drawbaugh's shop eight or ten times between the summer of 1874 and the fall of 1877, and "his general conversation was about the talking machine; said he would like to get it patented, but had not the means, and could make a fortune out of it." Drawbaugh testifies as follows: "Question. A good many witnesses have testified that you were at various times talking of patenting your electric-speaking telephone; what is your recollection about that?

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Did you intend to patent it or not? Yes, sir; I intended to patent it. I had spoken to a number of persons to assist me. I would state to them that I would give them an interest in the invention, for them to furnish the money to have it patented. Question. Why did you not patent it with your own money? Answer. I didn't have any money. Question. At how early a time did you have the intention of patenting it? Answer. I could hardly say how early. I spoke to persons even at an early time. I spoke to Christian Eberly. It may have been prior to 1870 I spoke to Frank Lee. I spoke to them about taking an interest. They were among the earliest. I can't remember all the persons, as I had spoken to a great many."

Lee is not a witness, having died in 1872. Christian Eberly locates the time as between 1867 and 1870. He had been a partner with Drawbaugh in a number of inventions, and was a capitalist. He was asked: "When Mr. Drawbaugh showed you his talking machine, state whether he proposed to you to go into partnership with him, and furnish the money for that also, as you had before that time on the other inventions?" He answered: "Not altogether; he intimated that he would take me in. I don't recollect as I said anything, or what I said." The witness was often in Drawbaugh's shop subsequently, in 1871, 1872 and 1873, but mentions no other proposition.

The only other persons Drawbaugh specifies as having been applied to by him are Capt. Moore, Henry Bayler, and Simon Oyster. Oyster was not called as a witness. Capt. Moore was examined as a witness for the defendants, and his testimony is significant. He was the principal of the Soldier's Orphan School, an institution in the vicinity of Eberly's Mills, and was the secretary and treasurer of the Axle Company, a concern that in part occupied Drawbaugh's shop in 1875 and 1876. He testifies, that, about May, 1875, Drawbaugh showed him a talking machine; said he was unable to patent it himself, and desired witness to "go in with him and get a patent." He states that he told Drawbaugh he didn't

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want to go into any new inventions, but that it would be a fortune to any person bringing it out, if it could be put to practical use. He identifies "Exhibit B" as the only machine shown him at that time by Drawbaugh. Although he and Drawbaugh maintained intimate business relations for a year after that time, the subject seems never to have been referred to again. Mr. Moore was an intelligent capitalist. It is strange that Drawbaugh should have shown him "Exhibit B," one-half of the crude instrument of 1867-1869, if the perfect instruments "E" and "D" were in existence; and more strange that the subject was never mentioned again between them, or that no attempt was made to speak through any machine, if they had any faith in the value of the invention. Mr. Bayler, the other witness, carried on lumbering and a saw mill from 1873 to 1877, in the vicinity of Milltown, and employed Drawbaugh frequently to repair machinery. He testifies, that, in June, 1873, Drawbaugh showed him the talking machine, and he said to Drawbaugh: "Why, Dan, that is virtually a talking telegraph," and advised him to take out a patent for it; to which Drawbaugh replied: "If I had the means, I would. If you'll advance me the means to procure a patent, I'll give you a half interest." The witness continues: "Generally, on him meeting me, he would urge it, urge me to take an interest by furnishing him the means to take out a patent." He also identifies Exhibits "F" and "B" as the instruments shown him by Drawbaugh. But his books show, that, during all the time from April, 1873, to May, 1876, he owed Drawbaugh more than the fees necessary for procuring a patent.

The defendants produce other witnesses to prove, that, from 1870 to 1879, Drawbaugh was showing his telephone, advertng to his poverty, and trying to induce somebody to assist him. Mr. Herr may be cited as an illustration. He testifies, that, in 1870 or 1871, Drawbaugh wanted money to get a caveat to secure his invention, and told the witness, if he would help him, or procure any person to assist him, he would give him a half interest. Without advertng farther to the tes-

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timony on this subject, it is sufficient to say, in view of the fact that there never was a time from 1867 to 1880, when Drawbaugh did not have the money to caveat and patent his invention, or the means of borrowing it, that the only legitimate effect of such testimony is to discredit the whole defence, by exciting the suspicion that it is bolstered up by exaggerated and unreliable testimony. It will be hereafter shown, that, among the men with whom Drawbaugh maintained business and friendly relations during this period, there were many of intelligence and means. Some of them may have distrusted his judgment, and regarded him as a visionary. Some of them may have been indifferent or timid. But it is incredible, that, when only a trifling sum was required for a half interest in the invention, none of them could be sufficiently impressed with its merit or financial value, to investigate it seriously as a speculation or an investment. He induced persons to invest in faucet inventions, and in his magnetic clock; and it cannot be true that he could find no one to entertain the talking machine, which, according to the common rumor of the neighborhood, was to supersede the telegraph, and, in the words of one of the witnesses, "make Drawbaugh the richest man in the Cumberland Valley." It was very natural that a hard headed old farmer like William Darr, on being told by Drawbaugh that he had a machine by which he could talk across the Atlantic Ocean, should advise him to "try it first in talking across the Yellow Breeches Creek," but it is beyond comprehension or belief that none of the capitalists or speculators about him could be induced to seriously consider it, if it was an operative device. Where a witness falsifies a fact in respect to which he cannot be presumed liable to mistake, Courts are bound, "upon principles of law, morality, and justice, to apply the maxim, *falsus in uno falsus in omnibus*." (*The Santissima Trinidad*, 7 Wheat., 283.) Drawbaugh could not be mistaken in asserting that it was his poverty which prevented him from caveating or patenting his invention. He was not led to the assertion inadvertently. Those with whom he is associated in the defence understood fully, and so did he, that the fact that a profes-

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sional inventor and patentee did not go to the Patent Office, to secure an invention like the telephone, for ten years after it had been completed and demonstrated, was almost conclusive against the theory that he had made the invention ; and that, unless this presumption could be parried, no Court would credit his story. The theory of constraining poverty was, therefore, formulated in the answer, elaborately fortified by witnesses, and testified to by Drawbaugh. It is overthrown by a few plain, indisputable facts, and Drawbaugh's veracity falls with it.

The defence must rest upon the testimony of the witnesses who corroborate Drawbaugh. The case made by these witnesses is sufficiently formidable to overcome the legal presumption of the validity of the complainants' patents. It is met by the complainants with rebutting evidence, direct and circumstantial, showing the intrinsic improbability of the theory that Drawbaugh was the inventor of the telephone, and showing his conduct or declarations inconsistent with any hypothesis that he was more than an unsuccessful experimenter with the invention. Many witnesses have also been produced by the complainants, to attack the credibility and reliability of the testimony of the defendants' witnesses. Of necessity, the testimony of most of the defendants' witnesses can only be attacked by showing that the witnesses are mistaken as to the time when they saw Drawbaugh's talking machine, or as to what they really saw on the occasions they refer to. The way in which the testimony of Uriah P. Nichols is met will illustrate the general tenor of such testimony. Mr. Nichols is one of the most intelligent and trustworthy of the defendants' witnesses, a farmer and machinist, who testifies, that, on the 18th day of January, 1875, he visited Drawbaugh's shop on business, saw two instruments, which he identifies as Exhibits "B" and "A," and he describes their mode of operation, as stated to him by Drawbaugh at the time. He says he listened at one instrument while a boy spoke into another two hundred feet away, connected by wires, and heard the boy say: "Is it you, father, speaking?" The complain-

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ants produce nine witnesses to show that the occasion could not have been prior to February, 1878. The witness fixes the date by a purchase of lime on the visit, and states that he went to Drawbaugh's to see an electric clock of which he had recently read a description in a newspaper, and, soon after the visit, told Mr. Maish and others about the telephone he had seen at Drawbaugh's. The complainants prove that the newspaper article was not published until February, 1878; that, when the witness told Mr. Maish of the telephone at Drawbaugh's, the latter, who was then a member of Congress, remembered the occasion, knew all about Bell's telephone at the time, and had used it in Washington. Mr. Maish states, that, as Drawbaugh was one of his constituents, he would have been deeply impressed by the conversation if he had understood Drawbaugh claimed to be the inventor. Without attempting to particularize the rest of the testimony for the complainants upon this issue, it suffices to say, that several other witnesses were introduced to show that the lime was not purchased by Nichols before 1876. Much testimony is given by the complainants upon collateral issues of a similar character. One of these issues relates to the time when Thomas Draper ordered a hydraulic ram of Drawbaugh. Mr. Draper is an important witness for the defendants. He testifies, that he went with Mr. Kissinger, a tenant of his, to Drawbaugh's shop, in May or the early summer of 1874, for the purpose of ordering of Drawbaugh a hydraulic ram, to be used upon the farm Kissinger had leased of him in April, and that he was never at Drawbaugh's on any other occasion. He identifies Exhibit "C" positively, and Exhibit "I" less positively, as the instruments used, and through which he listened while Drawbaugh talked. The complainants prove that the hydraulic ram was not put to use until the fall of 1878, and undertake to locate the date of Draper's visit approximately by that fact. Seventy-five witnesses were introduced by the respective parties upon this collateral issue. These illustrations show how hopeless a task it would be to review the testimony satisfactorily or analyze it minutely. Five hundred

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witnesses have been examined by the parties upon the main question and the collateral issues, and their testimony is in a printed record of over six thousand pages. If it were practicable to do so, it would not be profitable, because a microscopic view of the controversy would be inadequate and misleading. In cases where such a chaos of oral testimony exists, it is usually found, that the judgment is convinced by a few leading facts and *indicia*, outlined so clearly that they cannot be obscured by prevarication or the aberrations of memory. Such facts and *indicia* are found here, and they are so persuasive and cogent that the testimony of a myriad of witnesses cannot prevail against them.

The first group of facts of this nature are those which bear upon the capacity and character of Drawbaugh as an inventor, and tend to show that it is not only highly improbable, but almost impossible, that he could have been the author of the telephone. In the summer of 1878, he composed a biography of himself, for publication in the history of Cumberland County, which presents a graphic picture of the inventor and of the man. He commences by describing himself as "born in the quiet, secluded village of Milltown, three miles from Harrisburg," and as "one of the greatest inventive geniuses of this age, who has spent the greater part of an active life conceiving and producing, as the result of the conceptions of an unusually fertile brain, a score of useful, ingenious machines and devices." "It appears," he says, "by examining a list of his inventions, that the manufacturing interests of the place, in his boyhood days, gave direction to his thoughts and incentive to his actions." He proceeds to enumerate a list of his inventions as follows: "His first invention was an automatic sawing machine; then a number of machines used in wagon making; then a machine for boring spoke tenets; then a machine for sawing tenets; a barrel stave jointing machine, patented in 1851; this machine was pretty generally introduced, and its merits appreciated; an automatic grinding machine was next invented, to meet a demand created by the introduction of the jointer; then followed several machines for

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making stave headings and shingles, all of which were patented in 1855; after which machines for rounding, heading, crozing, dressing and finishing outside of barrels were invented; these were again followed by device for running mill-stones; one for dressing mill-stones; a device for elevating grain in mills. He then invented and had patented four improvements in nail plate feeding; next a tack machine, and a new design in tacks. Photography next engaged his attention. He fitted himself for action in this field by manufacturing his own camera, ground and fitted acromatic lenses for camera, prepared the necessary chemicals, and improved the process for enlarging pictures. Next electricity and electrical machinery attracted his attention, and an electric machine was produced, throwing out of consideration the galvanic battery and electric pile; then a machine for alphabetical telegraphing; then the justly celebrated electric clock, and the machinery necessary for its construction; and several kinds of telephones, one of which is operated by battery, and another by induction." He concludes as follows: "It will be seen from the foregoing, that Mr. Drawbaugh has penetrated vast fields in search of information, and with what success we leave it to the readers to determine. We are proud to own Mr. D. as a citizen of our township, and deem him worthy of a position at the head of the list of our prominent men, and are happy to accord him that position." This portrait, drawn by himself, depicts, without the aid of extrinsic evidence, the ignorance and vanity of the man, and incongruous and fantastic assortment of his inventive projects. It suggests, also, the character of a charlatan. That he was a skilful and ingenious mechanic is undoubtedly true. Invention was his hobby and his vocation, but that he was an inventor in the large sense is disproved by the nature and results of his work. Every patent that he obtained was for some improvement on existing devices, which involved mechanical skill rather than any high degree of inventive faculty. This is shown to some extent on the face of his patents, the list of which is as follows: November 11th, 1851, "for improvement in stave-jointing ma-

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chines ;" May 22d, 1855, "for stave machines ;" April 28th, 1864, "for improvement in mill-stones ;" May 12th, 1863, "for improved machine for levelling the faces of mill-stones ;" December 12th, 1865, "for improvement in nail plate feeders ;" November 20th, 1866, "for improvement in faucets ;" November 19th, 1867, "for improvement in nail-feeding device."

His own testimony, given in an interference proceeding in the Patent Office, in 1879, shows that none of his inventions were sufficiently meritorious to prosper vigorously. That proceeding involved a question of priority of invention between himself and one Hauck, respecting an improvement in a faucet. He had filed his application for a patent in January, 1879, and undertook to carry back the date of his invention to 1869. The scope and range of his inventive faculty became a subject of inquiry. He there testified that he had made, "he might say, fifty inventions, and had patented over a dozen." He was cross-examined respecting certain inventions, to show that they did not work satisfactorily. He was then asked : "Since 1866, what machines have you conceived and perfected that have worked satisfactorily ?" He answered, "To the best of my knowledge I think they all have. The nail machine gave satisfaction. I had it running in the works, but the nailers drove it out. The tram and red staff was a good machine, and adopted by a number of millers. The magnetic clock I consider a good thing, but I am not through with experiments on it yet. I believe this last faucet to be a good thing." If his nail machine had induced the workmen to drive it out of the shop, it ought to have commended itself to the capitalist. His magnetic clock had not been patented at this time, though it had been, for a time, the wonder and admiration of the community in which he lived ; but when it was patented, in 1879, it was as a "new article of manufacture," consisting of a galvanic battery for electrical clocks, which had two old elements united, instead of being disconnected, as in former devices. The history of this clock shows, clearly, that it was of no practical merit ; and the clock had

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been substantially described in Tomlinson's Encyclopedia, and he had the book before he made his alleged invention. His other electrical devices he never patented, and, in his testimony in the interference proceedings, he did not refer to them as among his perfected and successful inventions. One of these was his magneto-electric machine for short line telegraphing and fire alarms, sometimes mentioned as his "magneto key." It was not a new device, and the proofs show that it was a failure.

When the speaking telephone was first introduced to the attention of the scientific public, it was pronounced, by one of the most eminent electricians of the day, "a result of transcendent scientific interest," and "the greatest, by far, of all the marvels of the electric telegraph." The inventions attributed to Drawbaugh include not only the conception of the principle of the unbroken, undulatory electric current, and of the delicate and complex instrumentalities essential to its efficient application in transmitting and reproducing articulate speech, but also of many other devices involving a nice adjustment of forces, and requiring sensitive mechanism. These were inventions of a peculiarly scientific order, which would seem to demand a special conversance with the principles of acoustics and electricity. Besides making the cardinal discovery of the theory of the unbroken, undulatory current, Drawbaugh is assumed to have perfected a brilliant and extraordinary series of original discoveries, for which, to use the words of Mr. Benjamin, "there is no parallel instance in the whole history of invention." Mr. Benjamin, referring to the microphone which was introduced to the public in 1878 by Mr. Blake, but which is one of the instruments asserted to have been invented by Drawbaugh at an earlier date, says: "It was looked upon as a great and original discovery."

It was said by Chief Justice Taney, (*O'Reilly v. Morse*, 15 How., 111,) speaking of the invention of the telegraph: "No invention can possibly be made consisting of a combination of different elements of power, without a thorough knowledge of the properties of each of them, and the mode in which they

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operate on each other." "For no man ever made such an invention without having first obtained this information, unless it was discovered by some fortunate accident." None of Drawbaugh's alleged discoveries were made by accident. His statement is, that, starting with the belief that speech could be transmitted by electricity, he made first one contrivance and then another, gradually obviating difficulties and making advances experimentally, until he finally perfected the several inventions. In view of Bell's special equipment for investigation and experiment in electrical and acoustics science, it would not seem strange that his persistent efforts to effect the electrical transmission of speech were eventually successful, were it not that others, as intelligent, as well equipped, as ingenious and as persevering as he, had devoted years to the same object in vain. He had the assistance of Mr. Watson, an expert in electricity and a skilled workman in electrical mechanism, in constructing the apparatus employed in his experiments, and who also aided him in his experiments. He had demonstrated his inventive proficiency by inventions in telegraphy, for which patents were granted to him. And yet, had it not been for an accidental discovery made by him in June, 1875, and which would probably have escaped one whose trained faculties were not centred on a careful study of the phenomena, he might have failed.

Drawbaugh, on the other hand, was not only untutored, but he was isolated, by his associations and occupations, from contact with men of advanced science; he had narrow opportunities for instruction, and few incentives for profound research. Among the multitude of his inventive conceptions was one that a talking machine was a possibility. According to the testimony of Lory, a witness for the defendants, before Drawbaugh began his practical experiments, he exhibited a sketch of a machine that he was about to make, that would talk a distance of twenty miles, and work something like a telegraph. If this is true, he commenced on his telephone as the architect plans a building, or the engineer makes a draught of his structure. His own testimony shows that he

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did not attempt to qualify himself for electrical inventions by any systematic study, after he began experimenting with his talking machine. Although he had undoubtedly acquired considerable desultory information about electricity, and especially about the mode of operation and detail of construction of electrical mechanism, it is obvious, that, when he commenced with his talking machine, he was a tyro in electrical science, essaying the most difficult work of the electrician. It is almost incredible that the subtle intellectual discoveries which were a closed book to the ablest electrician could have been reached by a smatterer in science, or by any series of empirical experiments. As has been remarked, he seems to have discovered nothing accidentally; yet, from the beginning to the end of his narrative, there is nothing to indicate the conceptive origin, or the mental growth, of the alleged invention. He presents a number of devices in the chronological order of their production, and testifies that he made one and then another and another, as experiments led him to modifications and improvements. He cannot describe what receiver or other apparatus he used with his first transmitter, and testifies: "I had a number of crude apparatuses, but can't remember exactly the shape of any of them. I had membranes stretched over hoops,—over a hoop,—I remember that; and I had electro magnets, and the arrangement was varied; I don't remember exactly the arrangement." He testifies, that, when he used the cup machine, he used it in a continuous electric circuit, and thinks he used it as a receiver, with Exhibit "B" as a transmitter. He states, that he succeeded in transmitting speech with these two instruments, and, of course, he could only have done this by employing the unbroken undulatory current of electricity. He cannot state how he conceived the initial idea of the undulatory current and the continuous circuit, or subsequently the theory of any of the remarkable devices which he produces. His answers to questions intended to elicit such information may be illustrated by giving one of them: "I don't remember how I came to it; I had been experimenting in that direction; I don't remember of getting at

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it by accident either ; I don't remember of any one telling me of it ; I don't suppose any one told me." He produces sketches, or models, or originals of instruments, which he says he made from time to time ; he states that they were used to talk through on various occasions ; and, from these outlines of accomplished facts, leaves the history of his inventions to be filled out by inference and conjecture. An inventor can hardly forget the process of thought by which a great intellectual conception germinates and matures into the consummate achievement ; but Drawbaugh's memory is a blank. If the untutored mechanic educated himself into an accomplished electrician by his own experiments and observations, the incidents and phenomena which revealed new discoveries and illumined the way for new advances would be indelibly impressed upon his mind. It seems a little short of the miraculous, that a man of his capacity and equipment should have produced these inventions at all ; more marvellous still that he should have produced them without any intellectual perception of his discoveries.

Another group of important facts, which are satisfactorily shown by the proofs, are those which indicate Drawbaugh's own knowledge that he was not an original inventor of the telephone. Reference has been made to some of the evidence bearing upon his neglect to patent or caveat his invention, in discussing the question of his credibility as a witness. If no honest and reasonable explanation can be given for his conduct, the inference is very strong, that he knew he did not have a practical telephone to patent. He may have had a talking machine, which was well calculated to excite the curiosity of the community in which he lived ; he may have indulged in expectations that in time he could succeed in making a practical speaking telephone and reap fame and profit from it ; but his conduct is almost decisive against the supposition that he had even deluded himself with the belief that he had produced anything sufficiently practical and valuable to patent. He never attempted to exhibit it outside of his own shop, to prove that it would transmit speech at a distance

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of even a quarter of a mile. The proofs show, that, during all the years from 1867 to 1878, he did not attempt to avail himself of opportunities for demonstrating his invention, and bringing it to the notice of friends who were peculiarly qualified to appreciate, and were favorably circumstanced to assist him. One of these persons was Mr. Kiefer, who resided at Harrisburg, from 1863 to 1881, and during that period had charge of the telegraphs of the Pennsylvania Railroad Company, and was a member of a firm whose business was the manufacturing of fine electrical machinery. In 1873 he put up a fire-alarm system for that city. Drawbaugh made his acquaintance in 1874 or 1875, and brought his magnetic fire-alarm to Mr. Kiefer, for examination. At another time, he brought the works of his electric clock. He visited Mr. Kiefer, on various occasions, obtained small supplies from him, and habitually conversed with him upon the subject of his electrical contrivances. The period of these visits begins just about the time when, according to the theory of the defendants, Drawbaugh had constructed Exhibits "E" and "D," and the invention was complete. He never mentioned to Mr. Kiefer the fact that he had experimented with a telephone. Mr. Wilson was superintendent of telegraphs for the Northern Central Railway Company, at Harrisburg, from 1864 to 1875. He was also mayor of Harrisburg. The company had an electrical workshop and supply establishment there, for Mr. Wilson's department, between 1871 and 1875. During this time, Drawbaugh often came to the supply shop, and talked with Mr. Wilson about electrical experiments, and obtained parts of batteries, coils, magnets and other electrical material which the company had cast aside. He brought Mr. Wilson his electric clock and his magneto-electric key, and tried his machine for short-line telegraphing, at Mr. Wilson's office. He talked with him frequently about his inventions; but he never mentioned the telephone. His relations with David A. Houck were such that the latter procured him an opportunity to test his magneto key at the telegraph office of the railroad company at Mechanicsburg. Mr. Stees was the superintend-

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ent of a car company at Harrisburg, having shops in different parts of the city, connected by telegraph lines. He was the first person to employ Bell's telephone on these lines, when they were introduced into Harrisburg, late in 1877 or early in 1878. He was a friend of Drawbaugh, and Drawbaugh would naturally have applied to him if he wanted to test his telephone publicly and practically. Isaac Lloyd was a school teacher and an alderman at Harrisburg; had known Drawbaugh long; was accustomed to visit his shop from time to time; saw many of Drawbaugh's inventions; was present on one occasion, when Drawbaugh experimented with his magneto device for telegraphing, at Mr. Wilson's telegraph office. Drawbaugh visited him frequently, and they were accustomed to converse about Drawbaugh's inventions. Drawbaugh showed him his dial telegraph, his electric fire-alarm apparatus, and numerous other inventions. Witness assisted him about the electric clock. He was an owner of patents and a friend to whom Drawbaugh applied for loans, and was interested in mechanical subjects generally. The only mention ever made to him by Drawbaugh about a telephone was in 1878, when Drawbaugh told him he was experimenting with a telephone. From 1867 to July 1873, Drawbaugh was intimately connected with the persons composing the Drawbaugh Manufacturing Company, which was engaged in manufacturing devices under Drawbaugh's patents. He was a stockholder and the master mechanic of this company. Among the officers and stockholders were many men of capital and enterprise. There came a time when the managers of the company wanted Drawbaugh to suggest new devices for the company to manufacture. He never suggested the telephone nor attempted to induce the managers of that company to investigate or exhibit his talking machine. A number of the managers and employes of this concern testify that they never heard of the existence of the talking machine during the life of the company. Without attempting to refer to other testimony to the same general effect, what has already been referred to shows, that, if Drawbaugh had seriously de-

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sired to bring his talking machine into public notice and secure the fruits of his invention, he had ample opportunity to do so. Who can doubt, that, if he had a practical telephone to exhibit, he would have selected just such men as Kiefer, Wilson and the others to demonstrate it to them, and enlist them to demonstrate its utility and value to the public? Such an invention was of a kind well calculated to excite public interest and to impress practical men with a quick appreciation of its commercial importance and its pecuniary value. It was so sufficiently perfected, according to the theory of the defence, that a patent could have been obtained prior to 1870, to secure the application of the principle, and to compel every subsequent inventor to pay tribute to the discoverer of a new art. For years it was mechanically perfect, and its efficiency and importance as a great factor in human intercourse could have been demonstrated to the public without appreciable inconvenience or expense. Drawbaugh fully appreciated its importance and value. He had the means to patent it himself, and friends to assist him in introducing it into public use. He had the talent to induce others to invest in his inventions. No explanation is possible, why, under such circumstances, his efforts should have left no mark upon the annals of inventive progress, and given no evidence of life beyond the idle curiosity his talking machine excited in the circle of his admirers, during all these years. His conduct is more persuasive to show that he did not have a practical, operative telephone, than the testimony of a multitude of witnesses who may have seen and heard talking machines at his shop during this period. But the complainants have given evidence of his declarations, made by him before he had any interest to pervert the truth, which afford a reasonable explanation of his conduct, and go far to explain how the testimony of the corroborative witnesses may be reconciled with the truth.

In 1874-6 Drawbaugh issued a business card, advertising himself as "inventor, designer, and solicitor of patents." On the back of this card is printed a list of his inventions, as follows: "Stave heading and shingle cutter ; barrel machinery ;

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stave jointing machine ; tram and red staff for levelling face of mill stones ; rine and driver for running mill stone ; nail machinery for feeding nail plates ; pumps, rotary and others ; hydraulic ram ; the Drawbaugh rotary measuring faucet ; carpet rag looper ; electric clock and magneto-electric machine for short-line telegraphing, and fire alarm, and propelling electric clocks." He takes pains to say, of this magneto machine, on his card, that it "can be applied to any form of electric movement, and dispenses with a galvanic battery." He had obtained patents for some of these inventions, but had not for others. He was then experimenting with his electric clock, and with his magneto-machine for short-line telegraphing, fire alarms, etc., and included them in the list of his inventions. The omission to mention the most important one of all his inventions, one respecting which, according to his present testimony, there had not been a week from the time he made his first cup machine that he had not been engaged with it, one which was complete before his electric clock was complete, is a significant statement, by implication, that he had no such invention to advertise. It is to be remembered, that, when he chronicled his achievements in the autobiographical sketch of 1878, the Bell telephone had been introduced into commercial use at Harrisburg, three miles from Drawbaugh's shop, and the local newspapers had been full of the subject. The cursory allusion, in that autobiography, to "several kinds of telephones," is in striking contrast with the eulogistic description of the electric clock, and wholly inconsistent with the theory that he deemed himself to be the originator of the telephone, which, at that particular time, was a topic of universal interest.

In his testimony, given in 1879, in the interference proceeding with Hauck, although he did not include the talking machine in the category of his successful inventions, in the course of his testimony, he produced a sketch of his faucet, and stated that he made it "about 1874 to 1876, when I was experimenting on telephones or phonographs." He represented himself not as an inventor of that which he is

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now claimed to have perfected, but as an experimenter with a "telephone or phonograph." It is instructive to read this statement in juxtaposition with a statement made by him to Mr. Matthews in the preceding year. Mr. Matthews was the managing editor of the Baltimore American, and, in April, 1878, made a visit to Drawbaugh, at his shop, to see Drawbaugh's magnetic clock, in consequence of information received from a correspondent. He was a careful observer, who went there, obviously, for the purpose of writing an article for his paper. That his memory is unusually retentive and accurate, and that he is a careful and conscientious man, is apparent from a letter written by him in December, 1883, after the proofs in the case had been closed, and in which he manifests a desire to correct certain errors of detail in his deposition. Upon that visit, his attention was chiefly directed to the clock, but he examined Drawbaugh's other inventions, and conversed with him about them; and, among other things, conversed about the telephone. Drawbaugh's statement to him on that occasion was, that he had invented apparatus to send messages by means of an alphabet founded upon difference of sounds. He did not profess to be the inventor of the speaking telephone, or assert that he had ever transmitted speech successfully with his apparatus. He said that the idea of transmitting sounds in this manner was not new, and that he had read of it some years before in a publication translated from the French; and he denied Bell's right to claim the invention of the telephone, because of that publication. In the article founded on that interview, which Mr. Matthews subsequently wrote for publication in the Baltimore American, he adverts to the several useful agricultural and mechanical devices patented by Drawbaugh, and adds: "It may be mentioned, that Mr. Drawbaugh constructed a rude telephone long before Mr. Edison loomed up as the 'boss' inventor. He never expected to send articulate sounds over a magnetized wire, but he believed that an alphabet could be arranged after the manner of the musical scale, and that messages could be transmitted and understood by the varia-

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tions of tone and pitch. This unlettered mechanic came very near anticipating Edison and Bell in the invention of the telephone, and nothing but his poverty prevented him from conducting his experiments to a successful issue." His advertising card, his testimony before the Patent Office, his autobiography, and his statement to Matthews, authenticated in writing, were all made when he had no pecuniary interest to color the facts, and upon occasions when he was anxious to present himself in the most favorable light as an inventor; and they were all made after his talking machine, according to the theory of the defendants, was a perfect invention and known to be such by many of his friends and neighbors. These are declarations evidenced in writing, and one of them made under oath, which point in but one direction. They are consistent with his conduct. They show that he understood himself to be an experimenter with telephones or phonographs, but not the inventor of the speaking telephone. The complainant has supplemented this evidence by the testimony of other substantial witnesses, who had favorable opportunities to know what Drawbaugh had invented, and who describe what they saw and did not see at his shop, and narrate what he said about his talking machines on various occasions. This testimony indicates, that, at as late a period as in 1878-9, Drawbaugh was an experimenter, but not the author of the parent invention, nor one who had perfected any valuable improvement upon it; and is in substantial accord with his statement to Mr. Matthews and his testimony in the interference proceedings. What gives point and force to this testimony and parries the ordinary objections to the reliability of verbal declarations is, that these witnesses are persons who would have been forcibly impressed, because of their interest in the particular subject, by any assertion by Drawbaugh that he was an inventor of the telephone. During the time in question, Drawbaugh had friendly relations with the newspapers of the vicinity; his friends were frequently communicating laudatory notices of his mechanical and inventive efforts to the press; and he himself visited one of the newspaper offices in the spring of 1878,

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to show a telephone he had made. These newspapers had published articles about the Bell telephone; but, up to the spring of 1878, while many notices had been published in them about his electric clock and other inventions, describing him as a man of extraordinary genius, there had been no mention of the telephone; and when, in the spring of 1878, the subject was mentioned, he was referred to as one who was "inventing a telephone on a different plan from that now occupying the attention of the scientists," and as about completing "the new telephone he is now constructing."

In this connection it is to be noted, that, soon after telephones were introduced in Harrisburg, late in 1877, or early in 1878, Drawbaugh visited the offices where they were used, examined the inside of the instruments, and borrowed one to take home, which he kept for several days; and the instrument which he borrowed bears a close resemblance in appearance to Exhibit "A," which it is asserted he had made in 1873 or 1874.

No extended reference will be made to the testimony of other witnesses, such as Mr. Weaver and Mr. Grissinger, showing declarations of Drawbaugh made after the Bell telephone was in commercial use, to the effect, that, although he had experimented on the telephone years before Bell, he had obtained no satisfactory results.

It remains to consider what effect is to be given to the testimony of the multitude of witnesses who have been produced to substantiate the defence. Disregarding the testimony which is merely hearsay, and, therefore, incompetent as evidence of the main fact, the testimony of many other witnesses is overthrown by the palpable improbability of their statements, or by the contradictions between their statements and those of other witnesses for the defendants upon substantive points, or by successful attacks upon their accuracy, in the rebutting testimony of the complainants. There still remains a formidable number of witnesses who testify to seeing or using Drawbaugh's talking machine, and some of whom identify particular exhibits as the instruments

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which they saw or tried. No doubt is entertained that Drawbaugh was experimenting, at an early period, with telephones or phonographs. He knew about the phonograph or phonantograph of Scott, as early as in 1863. The membrane diaphragm, excited by sonorous waves, and the mechanism of the phonograph were not novelties, and, among the diversity of inventive possibilities, had probably attracted his interest. Prior to the issue of Bell's patent, Dr. Van De Weyde had made public experiments with the Reis telephone, at the city of New York, and others had made like experiments elsewhere. In May, 1869, a full description of the instrument and of the experiments was published in the newspaper, "The Manufacturer and Builder," treating it as a highly interesting curiosity, which contained the germ of great practical purposes. Whether other newspapers noticed the experiments or not, is not shown, nor is it shown that Drawbaugh saw the article in "The Manufacturer and Builder." It would be difficult to prove the circumstance if he did see it. Some such publication probably stimulated him to experiment. If he made a sketch of the mechanism at the start, the material for it was at hand. As is stated by Mr. Benjamin, it has been asserted of the Reis instrument, that certain sounds of the human voice can be transmitted by it, but, in truth, these are merely fragmentary reproductions of vocal sounds, and the transmission of articulate speech could not be effected, because it was constructed on the make and break principle, instead of on that of the undulatory unbroken current.

It is not strange to any reader of the autobiography that Drawbaugh should have taken up the telephone. That he and those about him should have treated it as a talking machine is entirely natural. That his talking machine, as late as in 1876, bore a striking resemblance to the Reis telephone, is shown by Mr. Shapley's testimony, a witness who noticed the resemblance, and loaned Drawbaugh a copy of the Scientific American describing it. There is enough here to explain Drawbaugh's declarations to his neighbors about the

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talking machine he was inventing, and to excite the curiosity of the community. A careful reading of the proofs renders it easy of belief that the witnesses who testify about casual visits to his shop, which occurred many years before their testimony was delivered, and to cursory tests of his instrument on those occasions, have confused the fragmentary and incoherent articulation of such an apparatus with the hearing of distinct words and sentences. When witnesses undertake (as many of them do) to give the exact words or sentence heard in the instrument five or ten years before, when their attention was not called to the subject afterwards, no hesitation is felt in rejecting such statements as utterly incredible. It may be charitably inferred that such a witness has confused his recollections with more recent impressions. As will hereafter be shown, the proofs demonstrate, that most of the witnesses who testify to having heard distinctly and coherently, through the talking machine, all those who indicate the Exhibits "B," "F," and "C" as the instruments, are mistaken, if they are truthful. If Drawbaugh was a charlatan, he may have assisted in deluding them; and the proofs show, that, between 1872 and 1874, a string telephone was in his brother's shop, in the village. The fact that he never attempted to exhibit his machine outside of his shop, where it could be used between points some considerable distance apart, and where its real capacity could be readily observed, is significant in this connection.

The more important testimony is that by which it is sought to identify the several exhibits, and show their existence at times consistent with the theory of the natural evolution of the invention. The identification of particular exhibits, as seen by the witnesses, among the various objects of curiosity at Drawbaugh's shop, several years before they testify, is necessarily unreliable, when it is attempted by observers who had no knowledge of the mode of operation, or of the internal organization of the instruments. Such witnesses could not appreciate what they saw, even if they examined the instru-

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ment. Most of the witnesses belong to this class. Indeed, the greater proportion of them do not profess to identify the exhibits positively. Some are more certain than others that particular exhibits are the instruments they saw. Exhibits "F," "B," and "C," are fragmentary remains of instruments, and their value depends upon Drawbaugh's descriptions of the operative parts that no longer exist. Scores of witnesses testify to seeing the tumbler device resembling Exhibit "F," and the tin can device resembling Exhibit "B," but the identification of the other exhibits prior to the date of Bell's patent is comparatively feeble. The appearance of Exhibits "F," "B," and "C" is sufficiently peculiar and distinctive to impress the memory of those who saw them. On the other hand, the other exhibits are not of this character, and all that ordinarily the witnesses can safely say of them is, that five years or more before testifying they think they saw or used a small walnut box externally resembling "I," or "A," or "E," or "D."

It may be said, generally, of all the testimony of the witnesses who attempt to identify exhibits, that it is mainly valuable when it proceeds from those who used the instruments which they think they remember, and obtained results. They must remember the results obtained much better than the minor differences of appearance presented by the instruments. Granting that Exhibits "F," "B" and "C" would be likely to be remembered, what shall be said of the value of the testimony of scores of witnesses who state that they tested these instruments, or saw others test them, and they articulated perfectly, when it appears, by the most authentic test, that these instruments were incapable of such articulation?

In March, 1882, after most of the proofs in the case had been taken, a test was made of the capacity of the exhibits to transmit speech, in the presence of the counsel and the experts for the respective parties. It is not accurate to say a test was made of the exhibits; but reproductions of "F," "B" and "C" were made by Drawbaugh, and, as rehabili-

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tated by him, were used for the test. Whether these were honest reproductions, no one can tell; but, such as they were, they were experimented with by Drawbaugh, before they were subjected to the test. Whatever else that test demonstrated, it proved that articulate speech could not have been practically communicated through Exhibits "F," "B" and "C," at Drawbaugh's shop, under similar conditions; and that only fragmentary or incoherent speech could be occasionally and exceptionally rendered by the reproduced instruments which had been experimented with privately before the public test. The proofs show, that, all along to 1878, Drawbaugh exhibited his earlier instruments, "F" and "B," to spectators, and used them as his talking machine, sometimes showing or using both together, and sometimes one of them. The testimony of the defendants' witnesses Springer, Moore, Musser and Bayler, is pertinent upon this point, and has been referred to. How is it to be explained, that he used these crude instruments in 1875 and 1876, as his talking machine, if he had the better instruments, especially such instruments as "E" and "D"? But, in view of the facts now shown, that these earlier exhibits are incapable of satisfactory articulation, what confidence can be placed in the rest of the testimony produced to identify exhibits? If the witnesses are mistaken in identifying these very characteristic instruments, and in recalling the results obtained through them, little reliance can be placed upon the identification of the other instruments, or upon the statement of the results which the witnesses think were obtained through them. If these witnesses are mistaken in the dates which they fix for the occasions they speak of, their testimony can be reconciled with all the probabilities of the case. And the reasonable explanation of their testimony is, that those witnesses who really saw or used the later exhibits, did so in 1876, 1877, 1878, and later, instead of on earlier occasions.

The proofs on both sides lead to the general conclusion, that Drawbaugh was not an original inventor of the speaking

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telephone, but had been an experimenter, without obtaining practical results, until the introduction of the instruments into Harrisburg. It is very probable, that, after reading in the Scientific American, loaned to him by Mr. Shapley, in October, 1876, the article purporting to describe Bell's telephone, but which really describes better the Reis apparatus, he undertook to improve his old devices. At that time, or after he had examined the telephone instruments at Harrisburg, and carried one of them home to study, he may have altered the organization of his instrument, and made the intermediate exhibits between "F" and "D." If he exhibited them at his shop, and was able to transmit speech through them, this fact will account for the testimony of the witnesses who identify these exhibits, and may be mistaken as to the time they saw them. The real history of his talking machine is known only to himself, and it will not be profitable to conjecture when he made the advanced instruments which he claims to have made in February, 1875, and the later instruments. It may be, that, in discrediting his narrative, and rejecting the theory of the facts which rest upon it, the value of the corroborative testimony has been underestimated. However this may be, no doubt is entertained as to the conclusion which should be reached upon the proofs.

Succinctly stated, most favorably for the defendants, the case is this: One hundred witnesses, more or less, testify, that, on one or more occasions, which took place from five to ten years before, they think they saw this or that device used as a talking machine; they are ignorant of the principle and of the mechanical construction of the instruments, but they heard speech through them perfectly well, and through one set of instruments as well as the other. This case is met on the part of the complainants, by proof that the instruments which most of the witnesses think they saw and heard through were incapable of being heard through in the manner described by them, and, further, that the man who knew all about the capacity of his instruments never attempted to

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use them in a manner which would demonstrate their efficiency and commercial value, but on the contrary, for ten years after he could have patented them, and for five years after they were mechanically perfect, knowing all the time that a fortune awaited the patentee, and with no obstacles in his way, did not move, but calmly saw another obtain a patent and reap the fame and profit of the invention. Without regard to other features of the case, it is sufficient to say that the defence is not established, so as to remove a fair doubt of its truth, and such doubt is fatal.

The observation of an eminent commentator may be quoted as apposite to the case: "No form of judicial evidence is infallible: however strong in itself, the degree of assurance resulting from it amounts only to an indefinitely high degree of probability; and perhaps as many erroneous condemnations have taken place on false or mistaken direct testimony, as on presumptive proof." (*Best's Ev.*, sec. 468.)

A decree is ordered for the complainants.

James J. Storrow and *Edward N. Dickerson*, for the plaintiffs.

Lysander Hill and *George F. Edmunds*, for the defendants.

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AGREEMENT.

1. By a written agreement made at London, between S., the manager of a theatre in New York, and C., an actor, of London, C. agreed to act, for 7 months, as leading man of that theatre, in such plays as should be given there, and in such other theatres as S. should direct, in the United States and Canada; C. to pay his own expenses to New York; 7 performances each week to constitute a week's business; S. to select the plays; S. to pay C. \$100 "for each performance in which he shall appear;" C. not to perform in any theatre in the United States or Canada till the contract should be fulfilled; S., by giving notice, to have the right to continue the contract for 6 weeks more. C. went to New York and acted at said theatre for 5 weeks. Then S. refused to let him act for 3

weeks, and refused to pay him his salary, \$2,100, for that time. Afterwards, C. acted for S. and was paid by him under the agreement. In a suit for the 3 weeks' salary: *Held*,

(1.) S. was required by the contract to permit C. to act, and C. was entitled to his salary although he did not "appear;"

(2.) C. did not lose any right, by afterwards acting for S. and being paid therefor;

(3.) C. was allowed to amend his complaint so as to recover the \$2,100 as damages instead of wages. *Coghlan v. Sletson*, 88

2. Where A. has agreed, in writing, to transfer to B. certain shares of stock, on specified conditions, and B. has agreed, in writing, to pay a specific sum of money therefor, B. cannot be allowed to show a verbal agreement that he was to sell the stock as agent for A. *White v. Boyce*, 414

3. If B. claims that there was fraud in the sale of the stock to him, his remedy is at law, for damages, and not in equity. *id.*

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1. A check owned by one bank, and sent by it to another bank, with the endorsement, "For collection, pay to the order of B, cashier," he being the cashier of the second bank, was sent by the second bank, for collection, to a third bank, under an arrangement by which the money, which was collected, went into a general account between it and the second bank. After the third bank received the check, the second bank failed, being largely indebted to the third bank. The first bank sued the third bank to recover the proceeds of the check: *Held*, that the restricted endorsement was notice to the third bank that the second bank held the check only as an agent, for collection, and did not own it, and that the plaintiff was entitled to recover. *Bank of the Metropolis v. First Nat. Bank*, 58

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TAX.**BANKRUPTCY.**

1. B., in Ohio, 11 months before the filing against him of a petition in bankruptcy, gave to a creditor a cognovit note, payable in 2 months, under which the creditor was authorized, at any time after the note matured, to enter a judgment against B., for the amount of the note. The judgment was entered 42 days before the petition in bankruptcy was filed, and on it the personal property of B. was taken, on execution: *Held*,
(1.) The mere giving of the cognovit did not constitute a procuring by B. of the taking of his property at the time it was taken, all the other

conditions of an illegal preference existing;

(2.) On the evidence, B. procured his property to be taken within 2 months before the filing of the petition. *Balfour v. Wheeler*, 2**BETTERMENTS.**

1. In a suit for betterments, under section 1,260 of the Revised Laws of Vermont, the plaintiff must have purchased the land "supposing the title to be good in fee," and is not entitled to recover if he purchased subject to a lien, of which he knew, and which he did not suppose to be invalid, and from which he supposed his grantor could and would relieve the land. *Jones v. Steam Stone Cutter Co.*, 167

BILL OF EXCEPTIONS.*See* **CIRCUIT COURT**, 1 to 6.**BILL OF LADING.**

1. Goods were shipped by a vessel, under a bill of lading containing this provision: "No damage that can be insured against will be paid for." The goods were damaged because of the faulty construction of the ballast tank of the vessel; and, having been insured, the loss was paid before the filing of the libel: *Held*, that the exemption was not to be construed as an exemption from liability for the negligence. *The Hadji*, 235
2. A bill of lading, after providing for demurrage for delay in unloading from a vessel empty petroleum barrels, said, "all other conditions as per charter-party." The charter-party provided that the cargo might consist of such barrels and of iron rails, and that the former should be discharged in the same berth with the rails. The barrels were above the rails. The vessel proceeded to a dock where the rails would be received, but where the dock owner refused to receive the barrels. Their consignee delayed for four days to provide a lighter to take them, after having agreed to do so: *Held*,
(1.) The provision as to unloading

the barrels was made a part of the bill of lading;

(2.) The detention was caused by the fault of the consignee. *Gronstadt v. Wuthoff*, 360

3. A through bill of lading of goods from Nashville, Tennessee, to Liverpool, England, for their transportation by specified railroads to New York, and thence by the steamship line to which the steamer belonged, on board of which the goods were, when they were lost by the stranding of the steamer, provided, that that company alone should be answerable for loss, in whose actual custody the goods were at the happening of the loss, and that "the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods;" *Held*, that, as, in the bill of lading, the terms and conditions of the transportation to New York by the railroads were separate and distinct from those of the ocean transportation, and the agent who signed the bill of lading signed as "agent severally, but not jointly," and the terms and conditions of the ocean carriage contained no clause as to the benefit of insurance, and the bills of lading issued by the steamer not in connection with railroad transportation did not contain any such clause, the carrier could not have the benefit of such insurance clause, as against an insurance company which, having insured the goods, had paid the loss, and then sued the carrier for the amount, on the ground of the negligence above set forth. *Phenix Ins. Co. v. Liverpool and Great Western Steamship Co.*, 372

4. That part of the through bill of lading which related to the ocean transportation excepted loss from accidents of the seas, occurring by the negligence of the master, mariners or servants of the ship-owners: *Held*, (1.) The owners of the vessel were common carriers of cargo; (2.) They could not lawfully contract for exemption from liability for the negligence of their agents in charge of the navigation of the vessel; (3.) As the answers admitted the jurisdiction of the District Court, and did not set up that the law of Great

Britain applied to the case, and that law, if different from that of the forum, was not proved as a fact, and there was no contracting in view of any other law than the recognized law of the forum, the case must be decided according to the law of the Federal Courts, as a question of general commercial law;

(4.) The libellant, having paid the loss, was subrogated to the rights of the insured, and could maintain this suit to recover the sum so paid. *id.*

BOND.

1. A railroad company issued bonds, by each of which it promised to pay the sum named in it, on a specified day, with interest payable annually, as provided in a mortgage on land, and also on the net income from operating a road of the company. The bond contained this clause: "In case such net earnings shall not, in any one year, be sufficient to enable the company to pay 7 per cent. interest on the outstanding bonds, then scrip may, at the option of the company, be issued for the interest:" *Held*, that the bond contained an absolute promise to pay the interest in money or in scrip; in money, if the interest should be earned; in scrip, at the election of the company, if it should not be earned. *Marlor v. Texas & Pacific R. R. Co.*, 464
2. The election not having been exercised by the company, before the interest became due, it became payable in money. *id.*
3. Presentment of the bonds for payment of interest was not a pre-requisite to a right of action for the interest. *id.*
4. An announcement by the defendant that it was not prepared to pay the interest either in money or in scrip was a waiver of the necessity of presentment. *id.*

C

CARGO.

1. Where there are several consignees of cargo, no one of them can control

the selection of the place of delivery.
Teikman v. Plock, 355

See BILL OF LADING, 1, 2.
CHARTER-PARTY, 2, 3.

CHARTER-PARTY.

1. In this case, demurrage, under a charter-party, for the detention of a vessel, was not allowed. *Teikman v. Plock*, 355
2. The duty of a charterer in respect to receiving cargo from the vessel, considered. *id.*
3. The charterer was not obliged to receive iron from the vessel, on a lighter, in the absence of proof of a usage to that effect. *id.*

See BILL OF LADING, 2.

CHECK.

See BANK.

CHINESE.

1. A person of Chinese race, born at Hong Kong, after its cession to Great Britain, and always a British subject, by occupation a seaman, shipped as cook, at Calcutta, in June, 1884, on a vessel bound to New York, and arrived there, where the crew were discharged. He was arrested on shore, and held by a United States Commissioner, to be sent back to the country from whence he came, he having no certificate under § 6 of the Act of May 6th, 1882, (22 U. S. Stat. at Large, 58,) as amended by the Act of July 6th, 1884, (23 Id., 116.) His intention was to ship, as soon as possible, as cook, on a vessel sailing for a foreign port. On *habeas corpus*: *Held*, that he was not a Chinese laborer, within the meaning of the Act of May 6th, 1882, (22 U. S. Stat. at Large, 58,) and that he should be discharged, on his own recognizance, in \$500, to ship on a voyage to a foreign port, within 30 days. *In re Ah Kee*, 520

CIRCUIT COURT.

1. Where an action at law, brought in the District Court, is tried there, by the Court, on an issue of fact, without a jury, on due waiver of a jury, and a writ of error is sued out to review in the Circuit Court the judgment entered on the decision of the District Court, no question arising on a bill of exceptions can be considered by the Circuit Court, on such writ of error. *Doty v. Jewett*, 65
2. The question is one of the power of the Circuit Court, and is not such a question of practice as is embraced in § 914 of the Revised Statutes. *id.*
3. Issues of fact, in an action at law, in a District Court, must, under § 566 of the Revised Statutes, be tried by a jury, and there is no statutory provision for the waiver of a trial by jury, and no special statutory power conferred on the Circuit Court to consider any questions raised by a bill of exceptions, in such an action not tried by a jury. *id.*
4. The plaintiffs having throughout treated the suit as an action at law, and brought a writ of error and not an appeal, it must be so treated by the Circuit Court. *id.*
5. The agreement of parties cannot authorize the Circuit Court to revise a judgment of the District Court in any other mode of proceeding than that which the law prescribes. *id.*
6. As the District Court had jurisdiction of the subject-matter and the parties, and there was no error in the record, and nothing found in the bill of exceptions could be considered, the Circuit Court affirmed the judgment, with costs. *id.*
7. Where a case is tried in a District Court by the Court without a jury, the exceptions to the findings of fact and law by that Court cannot be reviewed by the Circuit Court, on a writ of error. *Jackson v. United States*, 353
8. Where the Circuit Court for the District of Massachusetts had decid-

ed, in a suit by one corporation against another, to recover dividends due to the stockholders of the former, under a lease to the latter, that the right of action was in the former, and not in its stockholders, this Court, in a suit by one of such stockholders, against the latter, to recover part of the same dividends, held that the prior decision should be followed. *Read v. Atlantic & Pacific R. R. Co.*, 469

See JURISDICTION.
MASTER IN CHANCERY.

CITY OF NEW YORK.

See NEW YORK CITY.

CLERK.

See MASTER IN CHANCERY.

COLLISION.

1. In a case of collision between a barge, towed at the starboard side of a steam-tug, (both owned by the libellant,) and a steamer, the tug was held in fault for persisting in starboarding, when the green light of the steamer, which was on the starboard hand of the tug, had been shut out, for a long time, after both her side lights had been seen at one time, and when a signal of two whistles, given by the tug to the steamer, had not been answered by her, the usual course of the steamer, to make her landing, being known to the tug; and the steamer was held in fault for failing to see the lights of the tug. *The Pegasus*, 7
2. The District Court having dismissed the libel, this Court, on an appeal by the libellant, divided the damages, and allowed no costs to either party in the District Court, but allowed to the libellant costs in this Court. *id.*
3. In this case, a schooner, the R., sailing close-hauled, on the starboard tack, in the night, did not have her regulation side lights, and especially her green light, properly and brightly burning. She collided with another

schooner, the N., whose red light she saw, and which was sailing on the port tack. The N., though vigilant, did not see any light on the R., and did not see the R. till it was too late to avoid a collision. The R. kept her course: *Held*, that the failure of the R. to exhibit any light which the N. could see, relieved the N. from her duty to avoid the R., and the ignorance of the N. as to the course of the R. until it was too late for the N. to do anything to avoid a collision was excusable, and was produced by such fault of the R.; and that the R. was liable for the damage to the N. *The Royal Arch*, 209

See LIEN.
NEGLECT, 2.

COMMISSIONER OF PATENTS.

See JURISDICTION, 1 to 3.

COMMON CARRIER.

See BILL OF LADING, 3, 4.

CONFLICT OF LAWS.

See BILL OF LADING, 4.

CONNECTICUT RIVER.

See WATER-RIGHT.

CONTRACT.

See AGREEMENT.
PATENT, 11 to 16.
TELEGRAPH COMPANY.

CORPORATION.

1. When a stockholder in a corporation seeks to restrain it from going beyond its corporate powers, he must show that he has exercised due diligence, in the proper direction, to prevent what he seeks to restrain. *Leo v. Union Pacific Ry. Co.*, 23
2. One who purchases stock knowing that the corporation is engaged in the enterprises which he seeks to

- stop, consents to become a member of a corporation so engaged. *id.*
3. A railroad corporation may have large implied powers. *id.*
4. A bill to restrain a corporation from exceeding its powers, should make such specific and distinct allegations, that the Court can see that there is such excess. *id.*
5. The case made by the bill was, that a majority of the stockholders of the S. company resolved to avail themselves of their power, as a quorum, to sacrifice the interests of the minority of stockholders, for their own profit, by dissolving the corporation and selling its property and franchises to themselves, at half their real value; and that they had carried out the scheme and retain its fruits, and had deprived the plaintiffs, the minority stockholders, of what would be their share, on a fair division of the corporate property. The bill was filed against the R. company, as such majority of stockholders, and V., as a confederate, to obtain such share: *Held*,
 (1.) The proceeding to dissolve the S. company was regular;
 (2.) The majority of the stockholders could not sell the property to themselves at their own valuation;
 (3.) Neither the S. company, nor its stockholders, other than the plaintiffs, are indispensable parties to the suit;
 (4.) The plaintiffs are entitled to maintain the bill. *Ervin v. Oregon Railway and Navigation Co.*, 187
6. Notice to individual stockholders in a corporation is not notice to the corporation, and their knowledge of facts is not notice of such facts to the corporation. *Davis Improved Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co.*, 221
7. The fact that a person is a director of a corporation when it acquires a title will not charge it with the knowledge which such person has of any infirmity in its title, if such title is acquired from such person. *id.*

See BOND.

CIRCUIT COURT, 8.
 INSURANCE (*LIFE*), 3.
 MORTGAGE.
 RECEIVER.

COSTS.

1. In a suit in equity for the infringement of two patents, the plaintiff had a decree on only one, having failed to establish infringement of the other. The Court did not award costs to either party. *Adams v. Howard*, 47
2. Where a bill is taken *pro confesso*, and there is afterwards a final decree, a docket fee of \$20 is taxable, as part of the plaintiff's costs, under § 824 of the Revised Statutes, for the hearing, as a "final hearing," because the Court must decree the matter of the bill. *Andrews v. Cole*, 184
3. Where a Court of the United States dismisses a suit at law for want of jurisdiction, it cannot award costs against the plaintiff. *Penilarge v. Kirby*, 261
4. There is nothing in the provisions of §§ 823, 914 and 983 of the Revised Statutes, which has changed this rule. *id.*
5. Section 914, as to practice, does not apply to costs, and relates only to cases of which there is jurisdiction. *id.*
6. Sections 823 and 983 do not require the awarding of costs in all cases where there are no express statutory provisions to the contrary. *id.*

See COLLISION, 2.
 PATENT, 22.

COURT-MARTIAL.

See MINOR.

D

DAMAGES.

See COLLISION, 2.
 NEGLIGENCE, 4.

PATENT, 18.
SALE, 5.

DEMURRAGE.

See BILL OF LADING, 2.
CHARTER-PARTY.

DISTRICT COURT.

See CIRCUIT COURT, 1 to 7.

DUTIES.

1. Stockings composed of either wool or worsted and cotton, imported into the United States after the tariff Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 559,) went into effect, were not subject to duty under § 2 of that Act, as manufactures, wholly or in part, of wool or worsted, but were subject to duty under § 18 of the Act of July 14th, 1862, (12 *Id.*, 556,) as "stockings." *Viator v. Arthur*, 39
2. A specific description of an article, in a tariff Act, is not affected by a general description in a later tariff Act. *id.*

E

ENDORSEMENT.

See BANK.

ENLISTMENT.

See MINOR.

EQUITY.

1. A Court of Equity has no jurisdiction of libel or slander affecting title to property or property rights, unless threatened or apprehended repetition makes preventive relief proper and necessary; and a bill will not lie merely for an account of damage from such libel or slander. *Palmer v. Travers*, 185
2. H. and L. were partners. The defendants were their confidential

agents, and owned bonds issued by a State. Being ordered by H. and L. to buy for them some of the bonds, they charged H. and L., in account, with a sum of money, as paid for the bonds. The bonds were afterwards declared void by the highest Court of the State. The account was adjusted with the item in it, the defendants retaining the bonds, H. and L. supposing that the defendants had bought the bonds from other parties. L. having died, H., as survivor, sued, in equity, to set aside the transaction, rectify the account, and recover the amount due: *Held*,

- (1.) A suit in equity would lie;
- (2.) It was not necessary that the next of kin, or personal representative, of L. should be a party to the suit;
- (3.) The defendants being, in fact, the sellers of the bonds, without the knowledge of H. and L., and the bonds being worthless, and the transaction not having been ratified by H. and L., the sale must be set aside, and the account resettled. *Bischoffsheim v. Balzer*, 281

See AGREEMENT, 3.
CORPORATION, 1, 2, 4, 5.
COSTS, 2.
INJUNCTION.
MASTER IN CHANCERY.
PARTY.
PATENT, 7, 8, 11, 20 to 26, 57, 66, 67.
PRACTICE, 3 to 6, 9.
TRADE-MARK, 1.

ESTOPPEL.

See PATENT, 29.

EVIDENCE.

1. A merchant appraiser, acting in the re-appraisement of goods, who, after having taken an oath to diligently examine the goods, reports their dutiable value, cannot be allowed to testify, as a witness, that he did not so examine the goods, on the trial of a suit brought against the collector, to recover back duties paid on a valuation made as the result of such re-appraisement. Such testimony is against public policy. *Oelbermann v. Merriit*, 41

2. Clear evidence that a person died from poison is not furnished by the fact that, after death, prussic acid was found in his stomach, without evidence that there was enough to produce death. *Edwards v. Travelers' Life Ins. Co.*, 225
3. If he died from poison, it must be shown that he took it knowingly, in order to make out a case of suicide. *id.*
4. A mistake in ruling as to the order of proof is cured if the lacking proof is afterwards given. *id.*
5. A new trial will not be granted because one party offered in evidence a paper which the other party should have offered. *id.*
6. Where the plaintiff's patent antedates the defendant's, the defendant must prove, beyond a reasonable doubt, that his was the prior invention. When that is done, the plaintiff must show, by proof as convincing, that his invention preceded the defendant's. The evidence must be clear, positive and unequivocal, leaving nothing to speculation or conjecture. *Thayer v. Hart*, 229
7. Under an information; under § 3,397 of the Revised Statutes, as amended by § 16 of the Act of March 1st, 1879, (20 U. S. Stat. at Large, 348,) for the forfeiture of cigars, as removed from the place where they were made with out stamping the box with the number of the manufactory, and the number of the district, and the State, it was shown, at the trial, that the cigars were not made at the manufactory the number of which was stamped on the box: *Held*, that it was to be presumed the cigars were removed in the condition in which they were found. *Jackson v. United States*, 553

See AGREEMENT, 2.
PRACTICE, 1, 6.

EXPRESS COMPANY.

1. The principles laid down in *Express Cos. v. Railway Cos.*, (3 *McCrary*, 147,) approved and applied. *Fargo v. Redfield*, 527

2. The defendants' railroad was one-fifth in Vermont and four-fifths in Canada. A Vermont corporation, owning the part in Vermont, leased it to a Canadian corporation, owning the part in Canada, and the latter mortgaged the whole, to three trustees, defendants, two residing in Canada and one in Vermont, who took possession for breach of the mortgage. On a bill filed in the Circuit Court for Vermont, by an express company, to obtain accommodation for its business, over the road, at reasonable rates: *Held*,

(1.) The matter, as regarded the part of the road in Canada, must be left to be dealt with by the Courts of Canada;

(2.) The plaintiff was entitled, on giving security, to an injunction restraining the defendants from interfering with the facilities accorded to the plaintiff on the defendants' road within Vermont, and from refusing to transport thereon the messengers and matter of the plaintiff for reasonable compensation, to be agreed upon or fixed by the Court. *id.*

EXTRADITION.

1. T., the sub-manager of a bank in England, drew a check on an agent of the bank, received the money on it, and kept it, and turned into the bank a "blue slip," showing a debit and a credit in respect to the amount, the credit being correct but the debit fictitious. Being arrested for extradition, under the Treaty with Great Britain, on a charge of forgery, the Commissioner decided that the "blue slip" transaction was forgery, within the Treaty. On *habeas corpus* and *certiorari*: *Held*, that, regarding the "blue slip" as amounting to an entry by T. in the books of the bank, the transaction was not forgery, according to the rule prevailing in England, and the decision of the Court of Appeal, in the case of *In re Windsor*, (6 *Best & Smith*, 522.) *In re Tully*, 213

F

FORFEITURE.

See EVIDENCE, 7.

FORGERY.

See EXTRADITION.

FRAUD.

1. R., in Vermont, being insolvent, executed to V., July 21st, 1880, a mortgage on the homestead farm of R., in which his wife joined, for \$15,000, which was recorded August 9th. R. started a composition with his creditors, by deed dated July 27th, by which those who signed and sealed it agreed to take 25 per cent., in compromise, in four months from that date, and that R. might, during that time, dispose of his property, towards paying the composition. It was not provided that all the creditors should sign. V. was a creditor and signed. In October, knowing that the money was to be raised to pay the composition, he advanced the \$15,000 to R., who fled to Canada, paying little to his creditors, and abandoning the composition. The mortgage covered all the property the creditors could reach. B., a creditor, had agreed, for 25 per cent., to assign his claim to a brother of R. H. had an attachment on the farm prior to the mortgage, the *ad damnum* in the writ being \$1,500, but he obtained judgment for a larger amount. For \$125 paid him he signed and sealed the deed, and delivered to R. a writing discharging his attachment. B. first, and afterwards other creditors, attached the farm in 1881. Neither B. nor H. received the 25 per cent. In a suit by V., to foreclose the mortgage, in which B. and H. and the other attaching creditors were parties: *Held*,
 (1.) B. was really a party to the composition deed;
 (2.) That deed was good as to those who signed and sealed it;
 (3.) The mortgage was void as to those who did not sign the composition, who could attach the property;
 (4.) To the extent of the \$500 homestead exemption, it was not void;

(5.) V. was entitled to a foreclosure, as to the \$500 homestead right exemption, against all the defendants; against all but H., of the value of \$1,500, and against him on paying 25 per cent. of his debt; against all but B., of the amount of his attachment, and against that on paying 25 per cent. of his debt; and to no foreclosure against the attaching creditors subsequent to B. *Volentine v. Hurd*, 489

See AGREEMENT, 3.

I

INJUNCTION.

1. An injunction to restrain a public improvement should not be granted upon the application of a private party, unless the legal right and the threatened injury are clear and certain. *Turner v. People's Ferry Co.*, 272
2. In a suit in equity, brought by the United States, by direction of the Attorney-General, to repeal a patent for an invention, an injunction will not be granted, *pendente lite*, to restrain the commencement, or prosecution, of suits for infringement. *United States v. Colgate*, 412

See CORPORATION, 1, 2, 4.
 EXPRESS COMPANY.
 PARTY, 1.
 PATENT, 27 to 31.
 TELEGRAPH COMPANY.
 TRADE-MARK, 2.
 WATER-RIGHT.

INSURANCE, (LIFE.)

1. A life insurance company passed the following vote, February 6th, 1871: "Voted, that a dividend from the surplus of the company, of 50 per cent. upon life policies entitled to participate in the profits, which were issued prior to January 1, 1869, and of 40 per cent. upon endowment policies of the same year, be declared and made payable in accordance with the rules of the company, upon premiums

paid in 1868, when renewed previous to January 1st, 1873." The word "renewed," in this vote, is not limited to policies which were renewed or prevented from forfeiture by the payment of a premium, but includes participating, limited-payment policies which had been prevented from forfeiture prior to January 1st, 1873. *Heuser v. Continental Life Insurance Co.*, 161

2. Requirements in a policy of life insurance as to giving notice of death may be waived by the insurer, and are waived when the agent of the insurer misleads the assured. *Edwards v. Travellers' Life Ins. Co.*, 225

3. A policy of life insurance issued by a corporation of Massachusetts, recited an application by R., for insurance on the life of T., and the agreement of R. to pay annual premiums for 10 years, and insured the life of T., for \$5,000, for the benefit of his wife and their children, payable to them. It included a clause, that, after two or more annual premiums were paid, the policy was to be a paid-up one, of \$500 for each premium paid. R. afterwards surrendered the policy to the insurer, without the knowledge of the wife and children, and obtained a paid-up policy, on the life of T., payable to himself, for \$2,500. T. having died, R. furnished proofs of death, and was paid by the insurer the \$2,500. In a suit by the wife and children, against the insurer, to recover the amount due on the first policy: *Held*,

(1.) R. did not act as the agent of the plaintiffs, in surrendering the first policy;

(2.) Under the statute of Massachusetts, (*Gen. Stats.*, 1860, c. 58, § 62,) the policy enured to the benefit of the wife and children;

(3.) Proof of death was waived by the insurer, by accepting from the plaintiffs, without objection, an affidavit of the death, referring to proofs on file with the insurer, made by R.;

(4.) When R. surrendered the policy, the insurer held notes of his given for premiums, in lieu of money, which were afterwards paid by deducting their amounts from the mon-

ey payable on the second policy. The notes not having been paid as applicable to premiums on the first policy, and thus only two annual premiums having been paid on that policy, the plaintiffs were allowed to recover \$1,000, with interest from 90 days after the service of such affidavit. *Timayenis v. Mutual Life Ins. Co.*, 405

INSURANCE, (MARINE.)

See BILL OF LADING, 1, 3, 4.

INTEREST.

See BOND.

INTERNAL REVENUE.

1. An obligation or promise in this form: "Due the bearer one dollar, in goods, at our store, Kennedy, N. Y., Oct. 14, 1878. Aldrich, Sweetland & Co.," is not a "note used for circulation," within § 19 of the Act of February 8th, 1875, (18 U. S. Stat. at Large, 311,) and the promisors are not liable to a tax thereon. *United States v. White*, 82

See EVIDENCE, 7.

J

JUDGMENT.

See CIRCUIT COURT, 1 to 6.

JURISDICTION.

1. In a suit in equity, brought under § 4,915 of the Revised Statutes, against the Commissioner of Patents, in the Circuit Court for the District of Vermont, to obtain an adjudication that the plaintiffs were entitled to a patent, which the Commissioner had refused to issue, he accepted service of the subpoena, to have the same effect as if duly served on him by a proper officer, and acknowledged receipt of a copy, but did not appear in Court nor make any objection to proceeding to a decree. After hearing

the plaintiffs, a decree was made in their favor. A new Commissioner moved for a rehearing, principally on the ground that the Court had no jurisdiction: *Held*, that the motion must be denied. *Vermont Farm Machine Co. v. Marble*, 128

2. The exclusive jurisdiction, under § 4,915, is not in the Supreme Court of the District of Columbia. *id.*
3. The Circuit Court in Vermont had general jurisdiction of the subject, and the Commissioner, by accepting service, consented to be found in the District of Vermont, and his consent is binding on his successor. *id.*
4. A citizen of the District of Columbia is not a citizen of a State, within the meaning of the statutes conferring jurisdiction on the Circuit Courts of the United States, and the jurisdiction of those Courts does not extend to a controversy between an alien and a citizen of the United States who is not a citizen of a State. *Land Co. of New Mexico v. Elkins*, 208

See CIRCUIT COURT, 1 to 7.
COSTS, 3 to 6.
PARTY, 1,
PATENT, 20.

JURY.

See CIRCUIT COURT, 1 to 7.

L

LACHES.

See LIEN.
PRACTICE, 3, 5.

LEASE.

1. C., for a consideration of \$1,000, leased to M. a specified seat in a theatre, with the right to use it for 17 years, 4 months, and 9 days, when the theatre should be open for public performances "during the regular theatrical winter season of about forty weeks in each year," provided, that, in case of the destruction of the the-

atre by fire, or other unavoidable casualty, such right should cease, and C., and his executors, administrators, heirs and assigns, be released from all liability to M., and that if C., or his heirs or assigns, should, at any time, "elect to discontinue the use of the said building as a theatre, and to devote it to other purposes," he or they should have the right so to do, on tendering or paying to M. such proportion of the \$1,000, as the time then to elapse before the expiration of the lease should bear to the whole term. By the lease it was agreed, that, except during the "aforesaid regular theatrical winter seasons," and at all times except those at which M. should be entitled by the lease to use the seat, C., and his heirs and assigns, should have the use of it. C. held the land on which the theatre was built, under leases of it, reserving ground rents, which fact M. knew when he accepted the lease. He used the seat for over three years, during the regular theatrical winter seasons, till C., being in failing health, and having already lost a considerable sum of money by the theatre, ceased to give theatrical representations in it, and, less than six months afterwards, died, and the defendant was appointed his executrix. The ground rents not being paid, the lessors entered and evicted the defendant from the theatre, she not consenting. In a suit by M. against the defendant, to recover damages for being deprived of the use of the seat: *Held*,

(1.) The lease contained no covenant, express or implied, for the enjoyment of the use of the seat during the term, nor any covenant that performances should be given for forty weeks, during the regular annual theatrical winter seasons;

(2.) There was no covenant to pay back any part of the \$1,000 except under the special circumstances set forth in the lease;

(3.) The plaintiff was not entitled to recover. *Morse v. Cheney*, 508

LIEN.

1. A libel *in rem* against a vessel, for a collision, was filed more than four

years after the collision, while it was owned by a company which had bought it for a valuable consideration, without notice, twenty-three months after the collision, the vessel having been open to libel at all times before the sale: *Held*, that the lien had been lost. *The Bristol*, 239

LIFE INSURANCE.

See INSURANCE, (LIFE.)

M

MARRIED WOMAN.

See INSURANCE, (LIFE.) 3.

MASTER.

See NEGLIGENCE, 1, 5.

MASTER IN CHANCERY.

1. An interlocutory decree was made in a patent suit, in equity, appointing the deputy clerk of the Court a master to take an account of profits. This was done on the consent of both parties, in open Court. The decree did not, as required by the Act of March 3d, 1879, (20 *U. S. Stat. at Large*, 415.) assign special reasons for the appointment. The reference proceeded for 3 years, and the master made a report, for the plaintiff, which was excepted to and confirmed. Afterwards, the defendant moved to set aside the reference, showing that till after the confirmation his solicitor did not know of the statute, nor did the defendant know that the master was the deputy clerk: *Held*,

(1.) The objection to the appointment was waived by the consent;

(2.) The failure to assign the reasons in the decree could be disregarded or supplied, under § 954 or § 913 of the Revised Statutes;

(3.) The defendant, by his delay in making the motion, had waived the objection to such failure. *Fischer v. Hayes*, 505

2. Whether the statute applies to the

appointment of a master of this kind, *quære*. *id.*

3. The decree was amended *nunc pro tunc*, by reciting the fact of the consent, as a sufficient special reason for the appointment. *id.*

MINOR.

1. D. enlisted in the army, at the age of 19, in July, 1870, for five years, deserted in February, 1872, and was arrested as a deserter in October, 1880, and held for trial by a court-martial. When he enlisted, he had a mother living, and dependent upon him for support, who did not consent to his enlistment. All the time between his desertion and his arrest he was in the city of New York. A *habeas corpus* being issued on his application, while he was thus held, to procure his discharge, on the grounds, (1) that his enlistment was void; (2) that, if a deserter, he was not amenable to trial, because more than two years elapsed, after he deserted, before he was arrested: *Held*,

(1.) It was for the court-martial to decide whether the limitation of Article of War 103, (*U. S. Rev. Stat.*, § 1,342,) applied to the case, as that Court had jurisdiction of the offence, and the limitation was a matter of defence;

(2.) Under §§ 1,116, 1,117, and 1,118 of the Revised Statutes, a minor over the age of 16 may enlist in the army, but his enlistment may, during his minority, become invalid, at the election of his parents or guardian;

(3.) The enlistment being valid, the minor is bound by his representations forming part of the contract of enlistment. *In re Davison*, 473

MORTGAGE

1. On the foreclosure of a mortgage on the property and franchises of a railroad corporation created by Arkansas, the trustees under the mortgage purchased the property, on the sale, for the benefit of the bondholders. A new corporation was organized, its stock was issued to such bondholders, for unpaid interest on their bonds, and they received for their old bonds

new bonds issued under a new mortgage on the property. The stock passed into new hands, and its holders, acquiring control of the corporation, brought this suit in its name to set aside the new mortgage, as *ultra vires* and in violation of the Constitution of Arkansas: *Held*,

(1.) The new mortgage was given for property actually received, and the new bonds were the consideration of the conveyance of the property to the new corporation;

(2.) The vendors were the old bondholders, and the vendee was the new corporation;

(3.) The latter, on purchasing the property, could mortgage it to secure the purchase money;

(4.) The corporation could not be allowed to retain the property and not pay the purchase price;

(5.) The bondholders would be entitled to protection, as having a vendor's lien. *Memphis & Little Rock R. R. Co. v. Dow*, 48

See FRAUD, 1.

RECEIVER.

MUNICIPAL BOND.

1. The views of Wallace, J., in *Cowdrey v. Town of Canadea*, (21 Blatchf. C. C. R., 351), were adhered to by him, and those of Coxe, J., in *Rich v. Town of Ments*, (*Id.*, 492,) and *Chandler v. Town of Attica*, (*Id.*, 498,) were adhered to by him, as to the construction of the Act of the Legislature of New York, chap. 925 of the Laws of 1871, in regard to town bonds. *Rich v. Town of Ments*, 85

N

NATIONAL BANK.

1. A national bank had 7 directors. Its president wanted to borrow \$50,000 from it, but it had not that amount to lend to him. He applied to a bank in Canada. It refused because it could not lend the amount to him without exceeding the limit allowed to it for loans to individuals. But it deposited \$50,000, on interest, with

the national bank. Four of the directors of the latter assented to the transaction, and the \$50,000 was entered on its books, as a deposit by the Canada bank. It paid interest on the deposit for 8 months, and afterwards suspended. Its receiver rejected the claim. In a suit to recover it: *Held*,

(1.) The national bank had power to enter into the transaction;

(2.) It was made in the proper way, and was ratified;

(3.) The claim must be allowed, to be certified by the receiver, and paid ratably from the assets. *Eastern Townships Bank v. Vermont National Bank*, 498

See TAX.

NAVIGATION.

See COLLISION.

NEGLIGENCE, 2.

NEGLIGENCE.

1. C., a laborer, employed by a master stevedore, was unloading iron ore from a steamer, at a wharf, by filling it, in the hold, into tubs, which were hoisted by a chain, furnished by the steamer. The chain broke and the tub fell upon him, and injured him: *Held*,

(1.) It was the duty of the master of the steamer to provide a suitable chain, and, if he was negligent in that respect, the ship-owner and the vessel were liable;

(2.) Negligence in the master was shown, as a fact;

(3.) C. was not negligent or in fault;

(4.) The sum of \$750 should be awarded to him, as compensation. *The Rheola*, 124

2. A speed of about 11 knots an hour, (between 12½ and 13 miles,) by a steamer, in Long Island Sound, in a fog, near midnight, is not the "moderate speed" required by sailing rule No. 21, (*Rev. Stat.*, § 4,283,) and, where the death of a passenger on a vessel with which the steamer collides, in the fog, while going at such speed, is caused by such collision, the owner of the steamer will be held

liable for the negligence resulting in such death. *Clare v. Providence & Stonington Steamship Co.*, 195

3. Negligently imparting a contagious disease is actionable. *Smith v. Baker*, 240

4. In such a case, damages cannot be given for anything which the plaintiff might have avoided, by the exercise of the reasonable care of a prudent person. *id.*

5. The master of a British steamer which, on a voyage from New York to Liverpool, was stranded on the coast of Wales, held to have been negligent, in that he had reasonable ground to believe that he had been mistaken all along as to the position of his ship, because he had taken no cross bearings of a light which he saw, expecting to see it near at hand and in a certain direction, but seeing it in a different direction, and thinking he saw it at a great distance, and had not, on losing sight of that light, seen another light which ought to have been then seen, and had heard a fog-gun in a direction which indicated that the ship was in a dangerous position. *Phoenix Ins. Co. v. Liverpool & Great Western Steamship Co.*, 372

See BILL OF LADING, 1, 4.

NEW TRIAL.

See EVIDENCE, 5.

NEW YORK CITY.

1. Under the Act of the Legislature of New York, of April 9th, 1813, (2 *Rev. Laws of 1813*, ch. 86, p. 432, secs. 220, 221,) in connection with the ordinance of the Common Council of the City of New York, of December 31st, 1856, laying out East street, along the East river, a person who filled up the intermediate space lying between a lot owned by him and a street or wharf laid out along the East river, became the owner of such intermediate space when filled up, but did not acquire any riparian rights, or any rights of wharfage

along the bulkhead opposite such ground. *Turner v. People's Ferry Co.*, 272

P

PARTNER.

See EQUITY, 2.

PARTY.

1. A bill in equity by L., against E., and S., and B., alleged that E. and S. agreed to buy land; that it was bought, and title taken in the name of E.; that S. paid his share of the price, and became entitled to a conveyance of his share of the land; that L. had acquired the interest of S.; that S. had assumed to convey that interest to B.; and that E. threatened to convey to B.: *Held*, that S. was a necessary party to the suit, and that, as the Court had no jurisdiction as to him, no injunction could be granted against E. *Land Co. of New Mexico v. Elkins*, 203

2. An amendment of the bill cannot be allowed, which would amount to a new and materially different suit, either as to parties or as to cause of action. *id.*

See CORPORATION, 5.
EQUITY, 2.

PATENT.

1. Invention.
2. Patentability, (1.)
3. Novelty, (2.)
4. Utility, (3.)
5. Duration.
6. Abandonment.
7. Re-issue, (4 to 6.)
8. Interfering Patent, (7.)
9. Assignment, (8, 9.)
10. License, (10 to 16.)
11. Infringement.
12. Profits, (17 to 19.)
13. Damages.
14. Suit in Equity, (20 to 26.)
15. Injunction, (27 to 31.)
16. Particular Patents.
 - (1.) Dryfoos—Quilting machine, (32, 33.)

- (2.) Firth—Cake-pan, (84, 85.)
- (3.) Brainard—Compositors' copy distributor, (36, 37.)
- (4.) Hicks—Thermometer, (88 to 41.)
- (5.) Kreischer—Tiling, (42 to 46.)
- (6.) Van Geasen—Size or quality mark or ticket, (47.)
- (7.) Sullivan—Harness for fire-engine, (48 to 51.)
- (8.) Merrill—Steam-heating apparatus; Blessing and Townsend—Steam-trap; Albany Steam-Trap Co.—Steam-trap; Blessing—Steam-trap, (52 to 57.)
- (9.) Brush—Electric lamp, (58.)
- (10.) Vacuum Oil Co.—Hydro-carbon oil, (59.)
- (11.) Yale Lock Mfg. Co.—Post-office box, (60 to 63.)
- (12.) Severance—Rock-drill, (64 to 66.)
- (13.) Wooster—Machine for making ruffles; Wooster—Sewing machine for making band ruffling, (67, 68.)
- (14.) Celluloid Mfg. Co.—Piano-key, (69 to 71.)
- (15.) Matthews—Soda-water fountain; Matthews—Soda-water apparatus; Matthews—Vessel containing gas under pressure; Matthews—Fountain containing aerated beverage, (72 to 81.)
- (16.) Spill—Dissolving xyloidine; Spill—Manufacture of xyloidine, (82, 83.)
- (17.) Hayes—Ventilating louver, (84, 85.)
- (18.) Holmes and Roome—Electric lining for safe, (86 to 88.)
- (19.) Franklin Electric Gas-Lighting Co.—Electrical apparatus for lighting street-lamp, (89.)
- (20.) Bell—Telegraphy; Bell—Electric Telephony, (90 to 92.)

1. *Invention.*

See 36, 42 to 46, 54, 70, 78, 80, 81, 83 to 87.

2. *Patentability.*

1. The function or mode of operation of machinery is not patentable apart

from the machinery. *Reay v. Raynor*, 13

See 36, 42 to 46, 70, 78, 80, 81, 83 to 85.

3. *Novelty.*

2. Where only one article like the patented invention was made before, but it was used for two months and a half, publicly and practically, in ordinary work, with reasonable success, it was held to anticipate the patented invention. *Brush v. Condit*, 248

See 35, 41, 45, 46, 51, 78, 80 to 82.

4. *Utility.*

3. A patent cannot be declared void for want of utility in the invention, if that is useful in any degree. *Gibbs v. Hoefner*, 36

5. *Duration.*

See 88.

6. *Abandonment.*

See 75, 79.

7. *Re-issue.*

4. Where the original patent described a part of a machine, but stated no use for it, and made no claim in regard to it, and the re-issue stated the use and effect of the part, and made a claim in respect to it: *Held*, that the re-issue showed an invention different from the original, and that the claim was void. *Reay v. Raynor*, 13

5. It was void for the further reason that the re-issue was taken out more than three years after the original. *id.*

6. The invalidity of that claim does not necessarily render invalid claims of the original which are reproduced in the re-issue. *id.*

See 32, 33, 38 to 40, 59, 60 to 67, 72, 73, 89.

8. *Interfering Patent.*

7. In a suit in equity, brought under § 4,918 of the Revised Statutes, to obtain a decree declaring void, as an interfering patent, a patent issued later than the plaintiff's patent, the defendants cannot, by a plea, set up, as a defence, that the invention described in the plaintiff's patent was described in a patent issued and published prior to the time of the plaintiff's invention. *Pentlargo v. Pentlargo*, 10

See PRACTICE, 4.

9. *Assignment.*

8. The legal title to a patent will prevail over the equitable title, unless the former was acquired with notice of the latter. *Davis Improved Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co.*, 221
9. The two owners of a patent assigned to L. all their interest in it, in trust to sell rights and grant licenses for certain territory, at a specified price; to sell rights and grant licenses for other territory, on their request, and on terms they should name; to collect the proceeds, and, after deducting expenses and commissions, divide them equally among the two owners, their executors, administrators, or assigns; and, on request, to carry on suits. One of the assignors owned the exclusive right for certain territory, the other for certain other territory, and as to other territory they were joint-owners. The effect of the assignment was to make L. an agent having a power coupled with an interest. It operated to suspend the power of alienation for a period longer than the two lives of the assignors: *Held*, that the statute of New York prohibiting perpetuities did not apply to the case, because the assignors could at any time, with L., transfer the whole property, and could revoke at any time the powers of L., on tendering to him his commissions. *Laid v. Mills*, 242

10. *License.*

10. A license, known as a "shop right,"

to operate the invention at a specified place, with the right to the licensee to associate with him such party or parties as he may desire, is a personal license, not assignable, and can be availed of only in the manner expressly stipulated. *Gibbs v. Hoefner*, 36

11. If a licensor under a patent refuses to fulfil any of his obligations in matter of substance, a Court of equity will not interfere to assist him, by compelling the licensee to observe his obligations. *Foster v. Goldschmidt*, 287

12. Where the licensor agrees to use reasonable diligence in prosecuting infringers, his failure to prosecute some infringers of whose conduct the licensee has complained will not be regarded as a violation of the agreement, if, by successfully prosecuting other infringers, he has practically stopped the infringement. *id.*

13. Under an agreement by the licensor, that if any license shall be granted the conditions of which are more liberal, the licensee shall be entitled to receive the benefit of such additional advantages, he cannot insist on accepting those terms of the new license which are more favorable to him and rejecting those which are more onerous, but is entitled only to have a new license which, taken in all its parts, is more favorable to him. *id.*

14. After rejecting the new license, the licensee cannot be heard to allege that its terms were more advantageous to him. *id.*

15. An agreement that the licensor shall finish, "by the application of lacing studs, or hooks and lacing," gloves furnished to him by the licensee, gives the election to the licensor as to the mode of finish. *id.*

16. Where the parties to an ambiguous document have acted upon a certain construction of it, that construction, if in itself admissible, will be adopted by the Court. *id.*

11. *Infringement.*

See 19, 24, 34, 35, 41, 47, 50, 53 to 56, 71, 77, 80.

INJUNCTION, 2.

12. *Profits.*

17. The cost, to the defendant, of making a newel-post infringing the plaintiff's patent for a design, was \$5. It was sold for \$7. Allowing 10 per cent. for a manufacturer's profit, the profit was \$1 50. The defendant was, at the same time, selling newel-posts, of other designs, not patented, from which he realized as much as from sales of those containing the plaintiff's design: *Held*, that that fact did not dispel the presumption that the \$1 50 was profit from adopting the plaintiff's design. *Simpson v. Davis*, 118

18. Under § 4,919 of the Revised Statutes, when the defendant's profits do not amount to as much as the plaintiff's damages, the Court may, in a suit in equity, add to the amount of such profits a sum sufficient to make the amount decreed equal to the plaintiff's damages. *id.*

19. W. made and sold for use, to S., 5 machines which infringed a patent of C. C. had a decree in equity against W. for the profits of such sales, which was satisfied, in part by money, and, as to the rest, by levy on real estate. S. derived profits from the use of the machines. In a suit in equity by C. against S. to recover such profits, there was an interlocutory decree for the plaintiff, which directed an account of the profits before a master. On his report of the above facts: *Held*,

(1.) S. was not liable to C. for the profits of the use;

(2.) The bill must be dismissed. *Steam Stone Cutter Co. v. Sheldon*, 484

See 24.

13. *Damages.*

See 18.

14. *Suit in Equity.*

20. A patent was re-issued. Afterwards, and before it expired, a suit in equity was brought alleging infringement of the original patent, and not referring to the re-issue. After the patent expired, the bill was, by consent, amended to cover the re-issue instead of the original: *Held*, that the Court had jurisdiction, in equity, of the case made by the bill as amended. *Reay v. Raynor*, 18

21. Where a patent expires during the pendency of a suit in equity brought for its infringement, an accounting will be ordered, if the plaintiff establishes his cause of action, although no injunction can be granted. *Adams v. Howard*, 47

22. An assignee of a patent, having obtained a decision in his favor, in a suit in equity for infringement, moved, before the signing of an interlocutory decree, to amend the bill by averring that the assignment conveyed the right to recover profits and damages for prior infringements, and by praying an accounting for the same. It appearing that the litigation had been conducted on both sides in that view, the motion was granted, without prejudice to the question as to whether the decree should provide for such accounting. *New York Grape Sugar Co. v. Buffalo Grape Sugar Co.*, 182

23. A bill in equity on five different patents alleged that the inventions were capable of being used conjointly; that the plaintiff made, used and sold them conjointly, as parts of the same electric lighting system; and that the defendant infringed all of the patents, by making, selling and using all of the inventions conjointly, in a system of electric lighting. It appeared, by the patents, that the inventions could be used separately, and operate independently, with respect to each other, and, though used in the same system, were distinct parts of the system. A demurrer to the bill was sustained. *Consolidated Electric Light Co. v. Brush-Swan Electric Light Co.*, 206

24. In making a decree for an account, in a suit in equity for the infringement of a patent for a hinge, the Court held a certain hinge to be an infringement. On the reference, the master held that he could not extend the accounting to other hinges, as infringements. The plaintiff then moved for an order directing the master to take an account covering such other hinges. The motion was denied, as a practice not sustained by authority or usage, and as inconvenient. *Lull v. Clark*, 207
25. In this case, there was an interlocutory decree for the plaintiff, sustaining the validity of two patents, and awarding a perpetual injunction, and a reference before a master in respect to profits and damages, and a report by him in favor of the defendants, to which the plaintiff excepted. On the hearing of the exceptions, the Court reconsidered the case and dismissed the bill. *Spill v. Celluloid Mfg. Co.*, 441
26. A petition for leave to file a supplemental bill in the nature of a bill of review is demurrable, if it does not show that the petitioner could not, with reasonable diligence, have discovered the alleged new matters set forth therein, prior to the hearing and decision of the case; and if the new matters do not appear to be material. *id.*
- See 8, 19, 31, 57, 66, 67.
INJUNCTION, 2.
MASTER IN CHANCERY.
PRACTICE, 3 to 6, 9.
15. *Injunction.*
27. Where an inventor merely sees infringing machines, without claiming that they infringe, and does not lead the defendant into any expenditure or course of conduct, by his silence when he ought to have spoken, which the defendant would not have made or followed if the inventor had spoken, he is not debarred from the right to an injunction. *Reay v. Raynor*, 18
28. It being held that the defendant infringed certain claims by the use of machines made during the life of the patent, an injunction was granted, after the patent had expired, on the bill as one filed during such life, to restrain the continued use of the parts of those machines which embraced those claims. *id.*
29. H., the inventor, having assigned his patent to T., and, while in the employ of T., ordered certain machinery to be made as covered by the patent, which T. introduced to the public, left the employ of T., and procured like machinery to be made for himself, and, with the aid of C., who knew the facts, began to sell such machinery in competition with T.: Held, that, on a motion by T., for a preliminary injunction to restrain H. and C., they could not contest the validity of the patent or deny that it covered such machinery. *Time Telegraph Co. v. Carey*, 34
30. In a suit against a municipal corporation, founded on a patent for a register for preserving paid bonds and coupons, it was enjoined from using the patent. In the final decree, nominal profits and damages, and a small balance of costs, were adjudged to the plaintiff. A motion by the defendant to suspend the injunction during the pendency of an appeal from the final decree was denied. *Munson v. The Mayor, &c.* 45
31. In a suit in equity for infringing a patent, a preliminary injunction was granted as to claims 2 and 3. Before the time for answering had expired, the plaintiff brought a second suit in equity, in the same Court, against the same defendant, for infringing claim 2, and moved for a preliminary injunction, alleging that the apparatus now sought to be enjoined was, in all material respects, so far as claim 2 was concerned, the same apparatus as that enjoined in the first suit. On an objection by the defendant, that the remedy should be by a motion or proceeding in the first suit, the motion was denied, without prejudice to such motion or proceeding. *Gold & Stock Telegraph Co. v. Pearce*, 69
- See INJUNCTION, 2.

16. *Particular Patents.*(1.) *Dryfoos—Quilting machine.*

32. Re-issued letters patent, No. 9,097, granted, February 24th, 1880, to Louis Dryfoos, assignee of August Beck, for an improvement in quilting machines, the original patent, No. 190,184, having been granted May 1st, 1877; and re-issued as No. 8,068, January 29th, 1878, in so far as they claim, in effect, the combination of the gang of needles and cloth-plate with any feeding mechanism which would reach across the cloth and feed the long side faster than the other, claim an invention not shown in the original, and, except as to the mechanism shown in the original, beyond the invention in every way, and are invalid. *Dryfoos v. Weiss*, 19

33. Such invalidity does not avoid a new claim in the first re-issue, brought forward into the second re-issue; but that claim is not infringing. *id.*

(2.) *Firth—Cake-pan.*

34. Letters patent No. 140,619, granted to John B. Firth, July 8th, 1878, for an improvement in cake-pans, are valid, and are infringed by a structure made according to letters patent No. 255,045, granted to Joseph Smith, March 14th, 1882, for a patty-pan. *Bell v. United States Stamping Co.*, 27

35. The questions of novelty and infringement considered. *id.*

(3.) *Brainard—Compositors' copy distributor.*

36. Letters patent No. 149,092, granted to Charles Rollin Brainard, March 31st, 1874, for an improvement in compositors' copy distributors, are invalid, for want of patentability of what is claimed, namely, "The copy distributor described, consisting of the galley-holder N, provided with compartments for galleys, and pins or hooks for copy, correspondingly lettered, substantially as and for the purpose specified." *Brainard v. Evening Post Association*, 61

37. Before the invention of Brainard, a series of hooks for copy was lettered to correspond with the letters systematically placed upon the copy and marked upon the type when placed in the galley, and there was no invention in permanently lettering the galley to correspond with the lettering on the hooks. *id.*

(4.) *Hicks—Thermometer.*

38. Re-issued letters patent No. 10,189, granted to James Joseph Hicks, as assignee of L. Peroni, August 29th, 1882, for an improvement in thermometers, the original patent, No. 222,420, having been granted to said Peroni, December 9th, 1879, are valid. *Hicks v. Otto*, 94

39. Claim 1 of the re-issue, namely, "A thermometer having its bore in rear of or beyond the mechanical axis or centre of the convex surface through which it is viewed, as and for the purpose described," is not a broader claim than claim 1 of the original, namely, "A thermometer tube having its bore out of or beyond the mechanical axis or centre, as and for the purpose described." *id.*

40. The description in the original patent set forth, as the invention, what is claimed in claim 1 of the re-issue; and there was nothing in the state of the art to limit the invention to anything less than what is covered by that claim. *id.*

41. The questions of prior use, novelty and infringement considered. *id.*

(5.) *Kreischer—Tiling.*

42. Re-issued letters patent No. 5,174, granted, December 3d, 1872, to Balthasar Kreischer, for an improvement in tiling used in fire-proof buildings under the floors, the original patent having been granted March 21st, 1871, do not cover any patentable invention. *Fryer v. Maurer*, 100

43. The invention claimed is a hollow sectional tile combined with the girders of the building in such a manner that the tiling spans a space between opposite girders, the end sections be-

- ing supported upon or against the girders, and the middle section forming a key to bind the sections together, the whole having a flat under surface. *id.*
44. Nothing adduced on the question of novelty shows an arch of hollow tiles, on which the several sections have plane joints, or are supported merely by the wedging power of the plane voussoirs; but, as an arch of hollow tiles made in sections, supported by girders on either side, between the stones of fire-proof buildings, was old; and such an arch, having a flat under surface, with the voussoirs interlocked by indented joints, and a keystone with an indented joint, was old; and the latter arrangement, with a recess in the end sections of the arch, receiving the flanges of the girders, with air spaces on the upper side of the arch, was old, nothing of Kreischer's structure being wanting but the plane joints of the arch; and a flat arch, with plane joints, and the intrados with no curve, was old; and a flat arch of hollow bricks, with the pieces against the joists having one side perpendicular and the other oblique, and the intermediate pieces having parallel sloping sides, and the key piece being of a wedge form, was old; there was no invention in what Kreischer did. *id.*
45. Re-issued letters patent, No. 5,174, granted to Balthasar Kreischer, December 3d, 1872, for an improvement in tiling used in fire-proof buildings, under the floors, the original patent, No. 112,930, having been granted March 21st, 1871, are invalid, because everything which is of the substance of the invention was old, except a slight change in the form of the recess in the end sections of the tiling, and the patent describes that change vaguely, and sets forth no advantages as resulting from it. *Fryer v. Maurer*, 268
46. The decision in this case, *ante*, p. 100, confirmed. *id.*
- (6.) *Van Geesen—Size or quality mark or ticket.*
47. The claim of letters patent No. 149,-
- 896, granted to Halmeah Van Geesen, April 21st, 1874, namely, "As an article of manufacture, a size or quality mark or ticket, composed of two layers of paper, between which is secured the head or bridge of the fastening springs *c*, which extend through the bottom layer, and are adapted to fasten the ticket to a fabric," is a claim to constructing a tag of two layers of paper, and placing the bridge, or the head of the staple, between the layers, which are then fastened together, and is not infringed by a tag having a like staple secured by an eyelet, the lip of which clamp the bridge or head of the staple to the underside of the tag. *Kimball v. Cunningham*, 146
- (7.) *Sullivan—Harness for fire-engine.*
48. Letters patent No. 171,190, granted, December 14th, 1875, to Edward O. Sullivan, for improvements in harness for fire engines, are valid. *Worwick Mfg. Co. v. City of Buffalo*, 157
49. Claim 3 of the patent, namely, "3. The combination, with a harness for a fire-engine or like apparatus, of a device for suspending said harness above the place occupied by the horse when attached to the apparatus, substantially as and for the purpose set forth," does not claim the abstract idea of suspending a harness from the ceiling in a particular place. *id.*
50. As Sullivan was the first to enter this field of invention, such claim should be construed broadly, to cover any similar apparatus which suspends a harness in substantially the same manner. *id.*
51. On the question of novelty, it was held, that the defendants had succeeded only in casting doubt, but had not proved the want of novelty beyond a reasonable doubt. *id.*
- (8.) *Merrill—Steam-heating apparatus. Blessing and Townsend—Steam-trap. Albany Steam-Trap Co.—Steam-trap. Blessing—Steam-trap.*
52. Claims 1 and 3 of letters patent

granted to Helem Merrill, April 30th, 1867, for an improvement in steam-heating apparatus, namely, "1. The retaining of the water in the receiving and discharging cylinders until, at required heights, it exerts a power sufficient to perform the operations substantially as described and set forth." "8. I claim the method of returning the water of condensation to the boiler, substantially as described," must be construed as claims for the apparatus which performs the functions mentioned in the first claim, and which is the means for effecting the method specified in the first claim. *Albany Steam Trap Co. v. Feilhausen*, 169

53. On the construction given to all the claims of the patent, the defendants were held not to infringe. *id.*

54. Re-issued letters patent, No. 5,549, granted to James H. Blessing and Frederick Townsend, as assignees of James H. Blessing, August 26th, 1878, for an improvement in steam-traps, the original patent, No. 173,670, having been granted February 18th, 1872, are, as to claim 1, void for want of patentable invention, and, as to claim 5, not infringing. *id.*

55. Re-issued letters patent, No. 8,286, granted to the Albany Steam Trap Company, as assignees of James H. Blessing, June 18th, 1878, for an improvement in steam-traps, the original patent, No. 142,828, having been granted September 2d, 1873, are not infringed. *id.*

56. Letters patent, No. 207,484, granted to James H. Blessing, August 27th, 1878, for an improvement in steam-traps, are valid and are infringed. *id.*

57. As the plaintiff succeeded on only one of the four patents sued on, costs were not allowed to it. *id.*

(9.) *Brush—Electric lamp.*

58. Re-issued letters patent granted to Charles F. Brush, May 20th, 1879, for an improvement in electric lamps, known as the "clamp patent," the

original patent having been granted May 7th, 1878, considered. *Brush v. Condit*, 246

(10.) *Vacuum Oil Co.—Hydro-carbon oil.*

59. The claim of re-issued letters patent, No. 7,321, granted to the Vacuum Oil Company, as assignee, September 26th, 1876, the original patent, No. 58,020, having been granted to M. P. Ewing, September 11th, 1866, namely, "An unburned, residual, heavy hydro-carbon oil, substantially as described," is an unlawfully expanded claim, because it claims a product, however produced, while the original patent claimed the product when made in a certain way. *Vacuum Oil Co. v. Buffalo Lubricating Oil Co.*, 266

(11.) *Yale Lock Mfg. Co.—Post-office box.*

60. Re-issued letters patent, No. 8,788, granted to the Yale Lock Manufacturing Company, as assignee of Silas N. Brooks, administrator of Linus Yale, Jr., July 1st, 1879, for an improvement in post office boxes, on an application made May 14th, 1879, (the original patent having been granted to said Brooks, as administrator, September 19th, 1871, and re-issued July 9th, 1872, on an application made May 7th, 1872, and again re-issued April 24th, 1877, on an application made April 19th, 1875,) which were the subject of decision in *Yale Lock Mfg. Co. v. Scovill Mfg. Co.*, (18 *Blitchf. C. C. R.*, 248,) again considered. *Yale Lock Mfg. Co. v. James*, 294

61. The first and second claims of the re-issue must be so construed as to require the metallic front of the boxes to be made continuous by rivets, bolts or fastenings which attach the frames both to the woodwork and to each adjoining frame. *id.*

62. There was no mistake, defect or insufficiency in the description or claims of the original patent. *id.*

63. In the course of the application for the original patent, the applicant abandoned clauses making the attach-

ment of the frames to each other optional. *id.*

(12.) *Severance—Rock-drill.*

64. Claims 2 and 3 of re-issued letters patent, No. 3,690, granted to Asahel J. Severance, as assignee of Rudolph Leschot, October 26th, 1869, for an "improved rock drill," (the original patent having been granted to Leschot, July 14th, 1863,) namely, "2. The row of cutting edges *a*', when attached to a revolving boring head, so as to project beyond the circumference thereof, for the purposes specified. 3. In combination with a revolving and progressing boring head, having cutting points projecting beyond the periphery thereof, a hollow central drill rod, through which the water is forced or passed," are void, the claim of the original patent, namely, "The tool for boring or cutting rock or other hard substances, composed of an annular or tubular stock or crown, armed with a series of diamonds, and operating substantially as herein specified," having limited the invention to an annular crown, which would necessarily bore an annular hole, having a central core. *American Diamond Drill Co. v. Sullivan Machine Co.*, 298
65. There was in the original patent no error through inadvertence, accident or mistake, nor was there any defectiveness or insufficiency in the specification. *id.*
66. For the above reasons, the bill was dismissed, after the report of the master was made on an interlocutory decree for the plaintiff. *id.*

(13.) *Wooster—Machine for making ruffles.*
Wooster—Sewing machine for making band-ruffling.

67. In April, 1881, this Court made an interlocutory decree, (8 *Fed. Rep.*, 429,) adjudging re-issued letters patent No. 6,565, granted to George H. Wooster, July 27th, 1875, (on an application for a re-issue filed June 22d, 1875,) for an "improvement in machines for making ruffles," (the orig-

inal patent, No. 37,550, having been granted to Pipo and Sherwood, January 27th, 1863, on the invention of John A. Pipo,) to be valid, so far as claims 1, 7, 8 and 10 were concerned, and to have been infringed; and adjudging re-issued letters patent No. 6,566, granted to said Wooster, July 27th, 1875, (on an application for a re-issue filed July 19th, 1875,) for an "improvement in sewing machines for making band-ruffling," (the original patent, No. 46,424, having been granted to E. C. Wooster, February 14th, 1865, on the invention of Thomas Robjohn,) to be valid, so far as claims 8 and 9 were concerned, and to have been infringed; and awarding accounts of profits and damages, and perpetual injunctions. During the accounting, and in view of the decisions in *Miller v. Brass Co.*, (104 *U. S.*, 350,) and *James v. Campbell*, (*id.*, 356,) the defendants applied to the Court to reconsider the question of the validity of the re-issues: *Held*,

(1.) The Court has power to vacate the interlocutory decree;

(2.) The right to re-issue the Pipo patent was lost by the delay of more than 12 years, the case being one of a mere expansion of the claims beyond anything stated in the original patent as the invention, and with no proof of mistake or inadvertence, and it being sought to make the new claims embrace structures brought into use between the time of the issue of the original patent and the time of the application for the re-issue, and which were not infringements of the claim of the original patent; and the re-issue was invalid as to claims 1, 7, 8 and 10;

(3.) In the Robjohn re-issue, new matter was introduced, and the re-issue was taken to cover devices which did not infringe the original patent, and was invalid as to claims 8 and 9. *Wooster v. Handy*, 307

68. The bill was dismissed. *id.*

(14.) *Celluloid Mfg. Co.—Piano-key.*

69. Claim 1 of letters patent No. 210,780, granted, December 10th, 1878, to the Celluloid Manufacturing Company, assignee of John W. Hyatt, for

an improvement in the manufacture of piano keys, namely, "1. As a new article of manufacture, a blank keyboard covered with a continuous strip or roll of plastic composition, substantially as specified," is a valid claim. *Celluloid Mfg. Co. v. Pratt*, 367

70. The invention consisted in covering the entire upper surface of the keyboard with a sheet of celluloid, fastened to the wood with the usual celluloid cement, and was patentable. *id.*

71. It is an infringement of claim 1 to cover a substantial portion of the upper surface of the keyboard with a single sheet of celluloid, but it is not an infringement to cover single keys with separate strips of celluloid. *id.*

(15.) *Matthews—Soda-water fountain.*
Matthews—Soda-water apparatus.
Matthews—Vessel containing gas under pressure.
Matthews—Fountain containing aerated beverage.

72. Claims 1, 2 and 3 of re-issued letters patent No. 8,884, granted to John Matthews, August 5th, 1879, for an "improvement in soda-water fountains," on an application for re-issue filed June 26th, 1879, the original patent, No. 128,411, having been granted to said Matthews, June 26th, 1872, for 17 years from June 13th, 1872, namely, "1. The combination of the inner continuous tin fountain, A, having neck, *b*, with the rigid inclosing shell, made in sections, substantially as herein shown and described. 2. The tin vessel, A, inclosed by a cylinder, C, and ends, BB', in the manner substantially as described, as a new and improved article of manufacture, for the purpose specified. 3. The combination of the inner vessel, A, with the exterior covering, made in sections, which are united after being placed around the vessel, A, substantially as specified, the inner vessel being entirely continuous within the covering," are invalid. *Matthews v. Iron Clad Mfg. Co.*, 427

73. The text of the specifications of the original patent and the re-issue was

the same; the original had one claim, namely, "The tin vessel, A, incased by a steel cylinder, C, and ends, BB', soldered to the latter, in the manner substantially as described, as a new and improved article of manufacture, for the purpose specified;" the invention set forth in the original patent was a structure having these features: (1) a tin vessel or lining, A; (2) incased by a steel body or cylinder, C; (3) the outer end caps or ends, BB', soldered to the steel body or cylinder, C, without flanges or projections, by tin joints, made by soldering with pure tin, instead of by a solder having lead in it; the claim was adequate to secure that invention; there was no inadvertence, accident or mistake; the first three claims of the re-issue, by omitting all limitation to the method of soldering, enlarge the invention and the claim, so as to cover structures which came into existence after the original patent was granted, and before the re-issue was applied for; it was applied for seven years after the original was granted, and, during that interval, the defendant engaged in making the alleged infringing structures; and they did not infringe the claim of the original patent. *id.*

74. Claim 1 of re-issued letters patent No. 8,887, granted to John Matthews, August 5th, 1879, for an "improvement in soda-water apparatus," on an application for re-issue filed June 26th, 1879, the original patent, No. 137,702, having been granted to said Matthews, April 8th, 1878, namely, "1. The combination of the cock A, having recessed flange *a*, and packing *x*, in the recess, with the bung C, and shell or body D, of the fountain, substantially as herein shown and described," considered. *id.*

75. The invention covered by that claim was on sale more than two years before the application for the original patent. *id.*

76. The five claims of letters patent No. 159,438, granted to John Matthews, February 2d, 1875, for an "improvement in vessels containing gases and liquids under pressure," considered. *id.*

77. The first four claims of that patent are not infringed by a structure which is not a lamellar vessel, and has no lamellar cap or end, and no cap or end made by sweating together a number of caps coated with a soldering metal, but only has reinforcing washers at the end where there is an aperture. *id.*
78. As to claim 5 of that patent, namely, "5. The combination of the re-enforcing washers *d* with the end or body of the vessel, so as to re-enforce the parts weakened by apertures, as set forth," the state of the art was such, that there was no invention in applying a re-enforcing washer to an aperture in a structure like the defendant's; and such a washer as the defendant's existed substantially before Matthews' invention. *id.*
79. Moreover, the invention was extensively used by Matthews, in his regular business, more than two years before he applied for the patent. *id.*
80. Claim 1 of letters patent No. 179,583, granted to John Matthews, July 4th, 1876, for an "improvement in fountains containing aerated beverages," namely, "1. A metallic bung, provided with a recess, *c*, in combination with faucet, *e d*, substantially as described," is not infringed by a structure which has no washer in the bung casting, nor any recess for a washer; and, as a washer in a recess in a cock, to pack a joint, existed before, it hardly amounted to a patentable invention to change the position of the recess from the cock to the bung, there being no other result than convenience. *id.*
81. Claim 2 of that patent, namely, "2. In a fountain, a lining carried over the inner face of a metallic bung, and soldered thereto, substantially as shown, so as to protect the bung against corrosion, as set forth," does not, in view of the state of the art, claim a new or patentable invention. *id.*
- (16.) *Spill—Dissolving xyloidine.*
Spill—Manufacture of xyloidine.
82. Letters patent, No. 97,454, granted to Daniel Spill, November 30th, 1890, for an "improvement in dissolving xyloidine for use in the arts," are invalid, for want of novelty, as to the claim for the preparation and use of camphor in conjunction with alcohol or spirits of wine, as a solvent of xyloidine. *Spill v. Colloid M'f. Co.*, 441
83. The 2d claim of letters patent, No. 101,175, granted to Daniel Spill, March 22d, 1870, for an "improvement in the manufacture of xyloidine and its compounds," namely, "The process of bleaching xyloidine in the manner herein specified," rests only on the fact, that Spill discovered that xyloidine could be bleached by ordinary bleaching materials. But he merely applied the old process of bleaching by ordinary bleaching agents, to vegetable fibres, with no change in the manner of application, and with the same result; and this was not a patentable invention, in view of the state of the art, and of the decision in *Pennsylvania R. R. Co. v. Locomotive Engine Safety Truck Co.*, (110 U. S., 490.) *id.*
- (17.) *Hayes—Ventilating louver.*
84. Claims 1 and 5 of letters patent, No. 170,852, granted to George Hayes, December 7th, 1876, for an improvement in ventilating louvers, are invalid. *Hayes v. Buckelhoupt*, 463
85. Claim 1 is a claim for a louver, consisting of the combination of an outer reticulated covering, with curved alabs, called gutters, within; and claim 5 is for the gutters themselves. The covering and gutters together form an aggregation, and not a patentable combination, and there was no patentable invention in putting the two together for uses for which each was before well known separately. The use of the flanges was only the result of good workmanship. *id.*
- (18.) *Holmes and Rooms—Electric lining for safe.*
86. Letters patent No. 120,874, granted to Edwin Holmes and Henry C

Roome, November 14th, 1871, for an improvement in electric linings for safes, are valid. *Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co.*, 471

87. There was invention in making an electric lining to an outer covering for a safe, insulated from the safe, and so arranged that an attempt to get through the covering will affect the electrical conditions, and thereby give an alarm, although the outside of houses and other buildings and rooms had before been electrically protected. *id.*

88. Under § 4,867 of the Revised Statutes, the term of a patent here is to be as long as the remainder of the term for which a prior foreign patent was granted, even though the latter patent has been suffered to lapse for non-payment of tax. *id.*

(19.) *Franklin Electric Gas Lighting Co.—Electric apparatus for lighting street-lamp.*

89. In re-issued letters patent No. 9,748, granted to the Franklin Electric Gas Lighting Company, assignee of Jacob P. Tirrell, June 7th, 1881, for electrical apparatus for lighting street-lamps, the original patent, No. 180,770, having been granted August 20th, 1872, and the specifications of the original and the re-issue being precisely alike, what is claimed in claims 2 and 5 was not claimed anywhere in the original patent, as a part of the invention; that patent stood nearly nine years before those claims were made; the right under which the defendants operate had accrued before they were made; and those claims are invalid. *Electric Gas Lighting Co. v. Tillotson*, 481

(20.) *Bell—Telegraphy.*
Bell—Telephone.

90. Letters patent granted to Alexander Graham Bell, No. 174,465, March 7th, 1876, for "improvements in telegraphy," and No. 186,787, January 30th, 1877, for "improvements in electric telephony," are valid. *American Bell Telephone Co. v. People's Telephone Co.*, 581

91. Bell, and not Daniel Drawbaugh, was the inventor of the electric speaking telephone. *id.*

92. The claims of Drawbaugh considered with reference to these facts: (1) His failure to apply for a patent for the telephone, for 10 years; (2) His want of veracity, as a witness; (3) His want of acquaintance with electrical science; (4) His failure to bring a telephone into use. *id.*

PLEADING.

See AGREEMENT, 1.
CORPORATION, 1, 4.
PATENT, 20, 22.
PRACTICE, 4, 7.

PRACTICE.

1. Where, at the time a suit is removed from a State Court of New York, into this Court, by the defendant, under the Act of March 8d, 1875, (18 U. S. Stat. at Large, 470,) his examination under the Code of Civil Procedure of New York, as a witness, at the instance of the plaintiff, before trial, is pending, under an order of the State Court, the plaintiff has a right to proceed with the examination pursuant to the order. *Fogg v. Fisk*, 29

2. As a pending case, presenting the same question, involved a sufficient sum to be reviewed by the Supreme Court, and was to be presented to that Court, this Court, both judges concurring, stayed all proceedings in this case, and refrained from entering a judgment, until the decision in the other case, on writ of error, or until the further order of this Court. *Rich v. Town of Mentz*, 85

3. In a suit in equity for the infringement of a patent, there was an interlocutory decree for the plaintiff, and an injunction, a settlement, a license, and payment for a release. Afterwards the defendant applied for a rehearing, on the ground of newly discovered evidence. The application was denied, on the ground of laches. *Colgate v. Western Union Telegraph Co.*, 118

4. In a suit in equity brought under § 4,918 of the Revised Statutes, to determine a question of interference between two patents, where the defendant sets up, by plea, that the plaintiff's patent is void for want of novelty, and the plea is overruled on the ground that, in a proceeding under § 4,918, the plaintiff's patent cannot be attacked for want of novelty, the defendant will not be allowed to set up afterwards, in an answer, the matter contained in the plea. *Penilarge v. Penilarge*, 120
 5. After a final hearing on pleadings and proofs, and a decision in favor of the plaintiff, in a suit in equity for the infringement of a patent, the defendant applied for leave to amend the answer and for a rehearing, in order to set up a new defence of prior use. It did not appear that the facts constituting the new defence could not have been discovered, by reasonable diligence, before the hearing. The facts showing diligence were not specified, but the conclusion only was alleged. The application was denied. *Hicks v. Otto*, 122
 6. In a suit in equity on two patents, the testimony being closed as to one, and the cause set down for hearing, if the plaintiff desires to discontinue the suit as to that patent, he will be allowed to do so on the condition, to be inserted in the decree, that the evidence taken by the defendant in relation to that patent may be stipulated into any future suit upon the same patent by the plaintiff against the defendant. *Brush v. Condit*, 246
 7. A motion by the respondent, in a suit in Admiralty in the Circuit Court, to amend the answer, so as to set up, as a ground of defence, the law of Great Britain, enabling ship-owners to exempt themselves, by express contract, from liability for loss of goods carried by their ships, arising from negligence, was denied, on the ground that, under Rules 3 and 4 of the Circuit Court, the written appeal by the respondent had not stated that it was intended, on the appeal, to make new allegations. *Phenix Ins. Co. v. Liverpool and Great Western Steamship Co.*, 372
 8. In an action at law, where it was far from clear that the plaintiffs were entitled to recover, and the Court had, with grave doubt, directed a verdict for them for over \$5,000, an application by them to remit part of the verdict, so as to reduce it below \$5,000, and thus prevent a review by the Supreme Court, on a writ of error, was refused. *Rogers v. Bowerman*, 462
 9. In a patent suit, in equity, founded on two patents, the plaintiff, at the hearing, withdrew one of them, and had a decree on the other. The defendant applied for a rehearing, on the grounds, (1) that he supposed the main reliance was on the patent withdrawn; (2) that the defendant supposed the patent that was sustained, to be invalid; (3) that important considerations as to that patent had failed to come to the attention of the Court: *Held*, that a rehearing must be denied. *Everet v. Buffalo Lubricating Oil Co.*, 524
- R**
- RAILROAD.**
- See* BILL OF LADING, 3, 4.
BOND.
CORPORATION, 3.
EXPRESS COMPANY.
MORTGAGE.
RECEIVER.
TELEGRAPH COMPANY.
- RECEIVER.**
1. Where a railroad corporation, with its well-known obligations to the public, has become entirely insolvent and unable to pay the interest upon its secured debts, unable to pay its floating debt, unable to borrow money, and is in peril of the breaking up and destruction of its business, and confesses this inability, a case has

arisen where, upon a bill filed by a mortgage bondholder, for an injunction against attacks upon the mortgaged property and a receivership to protect the property of the corporation against peril, a temporary receiver may be appointed, although no default has yet taken place on the securities owned by the plaintiff, but a default is imminent and manifest. *Brassey v. N. Y. & New England R. R. Co.*, 72

2. The receivership in this case was not the result of any plan to injure the corporation or the holders of its securities, nor was the suit collusive between the parties, in the sense of a fraudulent collusion to deceive the Court, and thereby to accomplish selfish and improper purposes. *id.*

REHEARING.

See PRACTICE, 3, 9.

REMOVAL OF CAUSE.

1. To authorize the removal of a suit from a State Court, under subdivision 3, of section 689, of the Revised Statutes, the requisite diversity of citizenship must exist both when the suit was begun and when the petition for removal is filed. *Frelinghuysen v. Baldwin*, 1
2. A citizen of New York brought a suit, in a State Court, against a corporation of New Jersey and two corporations of New York, claiming to be a creditor, without judgment, of the New Jersey corporation. The complaint prayed that certain real estate alleged to have been paid for by that corporation, when insolvent, and conveyed directly to one of the other corporations, in fraud of the plaintiff's rights, be sold to satisfy his claims, and that the defendants be restrained from disposing of or encumbering the land. No judgment was asked for against the New Jersey corporation: *Held*, that this Court could not entertain jurisdiction of the case, by a removal of the suit by the New Jersey corporation, under clause 2 of section 2 of the Act of

March 8d, 1875, (18 U. S. Stat. at Large, 470,) because there was no separate and distinct controversy, which could be fully determined, between the plaintiff and the New Jersey corporation. *Moore v. North River Construction Co.*, 115

8. In an interpleader suit, in equity, brought by a life insurance company against different persons claiming to own a policy issued by it, one of the defendants removed the suit into this Court, under clause 2 of § 2 of the Act of March 8d, 1875, (18 U. S. Stat. at Large, 470,) alleging, in his petition, that the policy was his property. Another defendant moved to remand the cause, on the ground that there was but a single controversy in the suit, and that in that case a removal could be had only under clause 1 of § 2, and then only when all the plaintiffs or all the defendants should unite in the petition: *Held*, that the motion must be denied. *Mutual Life Ins. Co. v. Champlin*, 334
4. Subdivision 3 of § 689 of the Revised Statutes is not repealed by the Act of March 8d, 1875, (18 U. S. Stat. at Large, 470.) *Melendy v. Currier*, 508
5. The time of removal under that subdivision is not regulated by the Act of 1875; and a cause may, under that subdivision, be removed, after it has been once tried in the State Court and a new trial has been granted. *id.*

See PRACTICE, 1.

S

SALE.

1. An order, addressed to the defendant, read thus: "Messrs. C. P. Harris Mfg. Co. Order No. ——. Send to C. W. S. Banks, of 59 South St., Baltimore, Md. Terms, net 30 days, freight allowed. M. D. Berry, Agent." Then followed a list of goods, with prices, and "to be shipped after two months from date of this order." The order was in duplicate. Banks signed it at the foot. Berry

24. In making a decree for an account, in a suit in equity for the infringement of a patent for a hinge, the Court held a certain hinge to be an infringement. On the reference, the master held that he could not extend the accounting to other hinges, as infringements. The plaintiff then moved for an order directing the master to take an account covering such other hinges. The motion was denied, as a practice not sustained by authority or usage, and as inconvenient. *Lull v. Clark*, 207
25. In this case, there was an interlocutory decree for the plaintiff, sustaining the validity of two patents, and awarding a perpetual injunction, and a reference before a master in respect to profits and damages, and a report by him in favor of the defendants, to which the plaintiff excepted. On the hearing of the exceptions, the Court reconsidered the case and dismissed the bill. *Spill v. Celluloid Mfg. Co.*, 441
26. A petition for leave to file a supplemental bill in the nature of a bill of review is demurrable, if it does not show that the petitioner could not, with reasonable diligence, have discovered the alleged new matters set forth therein, prior to the hearing and decision of the case; and if the new matters do not appear to be material. *id.*
- See 8, 19, 31, 57, 66, 67.
INJUNCTION, 2.
MASTER IN CHANCERY.
PRACTICE, 3 to 6, 9.
15. *Injunction.*
27. Where an inventor merely sees infringing machines, without claiming that they infringe, and does not lead the defendant into any expenditure or course of conduct, by his silence when he ought to have spoken, which the defendant would not have made or followed if the inventor had spoken, he is not debarred from the right to an injunction. *Reay v. Raynor*, 18
28. It being held that the defendant infringed certain claims by the use of machines made during the life of the patent, an injunction was granted, after the patent had expired, on the bill as one filed during such life, to restrain the continued use of the parts of those machines which embraced those claims. *id.*
29. H., the inventor, having assigned his patent to T., and, while in the employ of T., ordered certain machinery to be made as covered by the patent, which T. introduced to the public, left the employ of T., and procured like machinery to be made for himself, and, with the aid of C., who knew the facts, began to sell such machinery in competition with T.: Held, that, on a motion by T., for a preliminary injunction to restrain H. and C., they could not contest the validity of the patent or deny that it covered such machinery. *Time Telegraph Co. v. Carey*, 34
30. In a suit against a municipal corporation, founded on a patent for a register for preserving paid bonds and coupons, it was enjoined from using the patent. In the final decree, nominal profits and damages, and a small balance of costs, were adjudged to the plaintiff. A motion by the defendant to suspend the injunction during the pendency of an appeal from the final decree was denied. *Munson v. The Mayor, &c.* 45
31. In a suit in equity for infringing a patent, a preliminary injunction was granted as to claims 2 and 3. Before the time for answering had expired, the plaintiff brought a second suit in equity, in the same Court, against the same defendant, for infringing claim 2, and moved for a preliminary injunction, alleging that the apparatus now sought to be enjoined was, in all material respects, so far as claim 2 was concerned, the same apparatus as that enjoined in the first suit. On an objection by the defendant, that the remedy should be by a motion or proceeding in the first suit, the motion was denied, without prejudice to such motion or proceeding. *Gold & Stock Telegraph Co. v. Peares*, 69
- See INJUNCTION, 2.

16. *Particular Patents.*

(1.) *Dryfoos—Quilting machine.*

32. Re-issued letters patent, No. 9,097, granted, February 24th, 1880, to Louis Dryfoos, assignee of August Beck, for an improvement in quilting machines, the original patent, No. 190,184, having been granted May 1st, 1877; and re-issued as No. 8,063, January 29th, 1878, in so far as they claim, in effect, the combination of the gang of needles and cloth-plate with any feeding mechanism which would reach across the cloth and feed the long side faster than the other, claim an invention not shown in the original, and, except as to the mechanism shown in the original, beyond the invention in every way, and are invalid. *Dryfoos v. Weiss*, 19

33. Such invalidity does not avoid a new claim in the first re-issue, brought forward into the second re-issue; but that claim is not infringing. *id.*

(2.) *Firth—Cake-pan.*

34. Letters patent No. 140,619, granted to John B. Firth, July 8th, 1878, for an improvement in cake-pans, are valid, and are infringed by a structure made according to letters patent No. 255,045, granted to Joseph Smith, March 14th, 1882, for a patty-pan. *Bell v. United States Stamping Co.*, 27

35. The questions of novelty and infringement considered. *id.*

(3.) *Brainard—Compositors' copy distributor.*

36. Letters patent No. 149,092, granted to Charles Rollin Brainard, March 31st, 1874, for an improvement in compositors' copy distributors, are invalid, for want of patentability of what is claimed, namely, "The copy distributor described, consisting of the galley-holder N, provided with compartments for galleys, and pins or hooks for copy, correspondingly lettered, substantially as and for the purpose specified." *Brainard v. Evening Post Association*, 61

37. Before the invention of Brainard, a series of hooks for copy was lettered to correspond with the letters systematically placed upon the copy and marked upon the type when placed in the galley, and there was no invention in permanently lettering the galley to correspond with the lettering on the hooks. *id.*

(4.) *Hicks—Thermometer.*

38. Re-issued letters patent No. 10,189, granted to James Joseph Hicks, as assignee of L. Peroni, August 29th, 1882, for an improvement in thermometers, the original patent, No. 222,420, having been granted to said Peroni, December 9th, 1879, are valid. *Hicks v. Otto*, 94

39. Claim 1 of the re-issue, namely, "A thermometer having its bore in rear of or beyond the mechanical axis or centre of the convex surface through which it is viewed, as and for the purpose described," is not a broader claim than claim 1 of the original, namely, "A thermometer tube having its bore out of or beyond the mechanical axis or centre, as and for the purpose described." *id.*

40. The description in the original patent set forth, as the invention, what is claimed in claim 1 of the re-issue; and there was nothing in the state of the art to limit the invention to anything less than what is covered by that claim. *id.*

41. The questions of prior use, novelty and infringement considered. *id.*

(5.) *Kreischer—Tiling.*

42. Re-issued letters patent No. 5,174, granted, December 3d, 1872, to Balthasar Kreischer, for an improvement in tiling used in fire-proof buildings under the floors, the original patent having been granted March 21st, 1871, do not cover any patentable invention. *Fryer v. Maurer*, 100

43. The invention claimed is a hollow sectional tile combined with the girders of the building in such a manner that the tiling spans a space between opposite girders, the end sections be-

ing supported upon or against the girders, and the middle section forming a key to bind the sections together, the whole having a flat under surface. *id.*

44. Nothing adduced on the question of novelty shows an arch of hollow tiles, on which the several sections have plane joints, or are supported merely by the wedging power of the plane voussairs; but, as an arch of hollow tiles made in sections, supported by girders on either side, between the stones of fire-proof buildings, was old; and such an arch, having a flat under surface, with the voussairs interlocked by indented joints, and a keystone with an indented joint, was old; and the latter arrangement, with a recess in the end sections of the arch, receiving the flanges of the girders, with air spaces on the upper side of the arch, was old, nothing of Kreischer's structure being wanting but the plane joints of the arch; and a flat arch, with plane joints, and the intrados with no curve, was old; and a flat arch of hollow bricks, with the pieces against the joists having one side perpendicular and the other oblique, and the intermediate pieces having parallel sloping sides, and the key piece being of a wedge form, was old; there was no invention in what Kreischer did. *id.*

45. Re-issued letters patent, No. 5,174, granted to Balthasar Kreischer, December 3d, 1872, for an improvement in tiling used in fire-proof buildings, under the floors, the original patent, No. 112,930, having been granted March 21st, 1871, are invalid, because everything which is of the substance of the invention was old, except a slight change in the form of the recess in the end sections of the tiling, and the patent describes that change vaguely, and sets forth no advantages as resulting from it. *Fryer v. Maurer*, 268

46. The decision in this case, *ante*, p. 100, confirmed. *id.*

- (6.) *Van Geasen—Size or quality mark or ticket.*

47. The claim of letters patent No. 149,

896, granted to Halmeah Van Geasen, April 21st, 1874, namely, "As an article of manufacture, a size or quality mark or ticket, composed of two layers of paper, between which is secured the head or bridge of the fastening springs *c*, which extend through the bottom layer, and are adapted to fasten the ticket to a fabric," is a claim to constructing a tag of two layers of paper, and placing the bridge, or the head of the staple, between the layers, which are then fastened together, and is not infringed by a tag having a like staple secured by an eyelet, the lips of which clamp the bridge or head of the staple to the underside of the tag. *Kimball v. Cunningham*, 146

- (7.) *Sullivan—Harness for fire-engines.*

48. Letters patent No. 171,190, granted, December 14th, 1875, to Edward O. Sullivan, for improvements in harnesses for fire engines, are valid. *Worwick Mfg. Co. v. City of Buffalo*, 157

49. Claim 3 of the patent, namely, "3. The combination, with a harness for a fire-engine or like apparatus, of a device for suspending said harness above the place occupied by the horse when attached to the apparatus, substantially as and for the purpose set forth," does not claim the abstract idea of suspending a harness from the ceiling in a particular place. *id.*

50. As Sullivan was the first to enter this field of invention, such claim should be construed broadly, to cover any similar apparatus which suspends a harness in substantially the same manner. *id.*

51. On the question of novelty, it was held, that the defendants had succeeded only in casting doubt, but had not proved the want of novelty beyond a reasonable doubt. *id.*

- (8.) *Merrill—Steam-heating apparatus. Blessing and Townsend—Steam-trap. Albany Steam-Trap Co.—Steam-trap. Blessing—Steam-trap.*

52. Claims 1 and 3 of letters patent

granted to Helem Merrill, April 8th, 1867, for an improvement in steam-heating apparatus, namely, "1. The retaining of the water in the receiving and discharging cylinders until, at required heights, it exerts a power sufficient to perform the operations substantially as described and set forth." "3. I claim the method of returning the water of condensation to the boiler, substantially as described," must be construed as claims for the apparatus which performs the functions mentioned in the first claim, and which is the means for effecting the method specified in the first claim. *Albany Steam Trap Co. v. Felthousen*, 169

53. On the construction given to all the claims of the patent, the defendants were held not to infringe. *id.*

54. Re-issued letters patent, No. 5,549, granted to James H. Blessing and Frederick Townsend, as assignees of James H. Blessing, August 26th, 1878, for an improvement in steam-traps, the original patent, No. 178,670, having been granted February 18th, 1872, are, as to claim 1, void for want of patentable invention, and, as to claim 5, not infringed. *id.*

55. Re-issued letters patent, No. 8,286, granted to the Albany Steam Trap Company, as assignees of James H. Blessing, June 18th, 1878, for an improvement in steam-traps, the original patent, No. 142,323, having been granted September 2d, 1878, are not infringed. *id.*

56. Letters patent, No. 207,484, granted to James H. Blessing, August 27th, 1878, for an improvement in steam-traps, are valid and are infringed. *id.*

57. As the plaintiff succeeded on only one of the four patents sued on, costs were not allowed to it. *id.*

(9.) *Brush—Electric lamp.*

58. Re-issued letters patent granted to Charles F. Brush, May 20th, 1879, for an improvement in electric lamps, known as the "clamp patent," the

original patent having been granted May 7th, 1878, considered. *Brush v. Condit*, 246

(10.) *Vacuum Oil Co.—Hydro-carbon oil.*

59. The claim of re-issued letters patent, No. 7,321, granted to the Vacuum Oil Company, as assignee, September 26th, 1876, the original patent, No. 58,020, having been granted to M. P. Ewing, September 11th, 1866, namely, "An unburned, residual, heavy hydro-carbon oil, substantially as described," is an unlawfully expanded claim, because it claims a product, however produced, while the original patent claimed the product when made in a certain way. *Vacuum Oil Co. v. Buffalo Lubricating Oil Co.*, 266

(11.) *Yale Lock Mfg. Co.—Post-office box.*

60. Re-issued letters patent, No. 8,788, granted to the Yale Lock Manufacturing Company, as assignee of Silas N. Brooks, administrator of Linus Yale, Jr., July 1st, 1879, for an improvement in post office boxes, on an application made May 14th, 1879, (the original patent having been granted to said Brooks, as administrator, September 19th, 1871, and re-issued July 9th, 1872, on an application made May 7th, 1872, and again re-issued April 24th, 1877, on an application made April 19th, 1875,) which were the subject of decision in *Yale Lock Mfg. Co. v. Scovill Mfg. Co.*, (18 *Blitchf. C. C. R.*, 248,) again considered. *Yale Lock Mfg. Co. v. James*, 294

61. The first and second claims of the re-issue must be so construed as to require the metallic front of the boxes to be made continuous by rivets, bolts or fastenings which attach the frames both to the woodwork and to each adjoining frame. *id.*

62. There was no mistake, defect or insufficiency in the description or claims of the original patent. *id.*

63. In the course of the application for the original patent, the applicant abandoned clauses making the attach-

ment of the frames to each other optional. *id.*

(12.) *Severance—Rock-drill.*

64. Claims 2 and 3 of re-issued letters patent, No. 3,690, granted to Asahel J. Severance, as assignee of Rudolph Leschot, October 26th, 1869, for an "improved rock drill," (the original patent having been granted to Leschot, July 14th, 1863,) namely, "2. The row of cutting edges *a'*, when attached to a revolving boring head, so as to project beyond the circumference thereof, for the purposes specified. 3. In combination with a revolving and progressing boring head, having cutting points projecting beyond the periphery thereof, a hollow central drill rod, through which the water is forced or passed," are void, the claim of the original patent, namely, "The tool for boring or cutting rock or other hard substances, composed of an annular or tubular stock or crown, armed with a series of diamonds, and operating substantially as herein specified," having limited the invention to an annular crown, which would necessarily bore an annular hole, having a central core. *American Diamond Drill Co. v. Sullivan Machine Co.*, 298

65. There was in the original patent no error through inadvertence, accident or mistake, nor was there any defectiveness or insufficiency in the specification. *id.*

66. For the above reasons, the bill was dismissed, after the report of the master was made on an interlocutory decree for the plaintiff. *id.*

(13.) *Wooster—Machine for making ruffles.*

Wooster—Sewing machine for making band-ruffling.

67. In April, 1881, this Court made an interlocutory decree, (8 *Fed. Rep.*, 429,) adjudging re-issued letters patent No. 6,565, granted to George H. Wooster, July 27th, 1875, (on an application for a re-issue filed June 22d, 1875,) for an "improvement in machines for making ruffles," (the orig-

inal patent, No. 37,550, having been granted to Pipo and Sherwood, January 27th, 1863, on the invention of John A. Pipo,) to be valid, so far as claims 1, 7, 8 and 10 were concerned, and to have been infringed; and adjudging re-issued letters patent No. 6,566, granted to said Wooster, July 27th, 1875, (on an application for a re-issue filed July 19th, 1875,) for an "improvement in sewing machines for making band-ruffling," (the original patent, No. 46,424, having been granted to E. C. Wooster, February 14th, 1865, on the invention of Thomas Robjohn,) to be valid, so far as claims 8 and 9 were concerned, and to have been infringed; and awarding accounts of profits and damages, and perpetual injunctions. During the accounting, and in view of the decisions in *Miller v. Brass Co.*, (104 *U. S.*, 350,) and *James v. Campbell*, (*id.*, 356,) the defendants applied to the Court to reconsider the question of the validity of the re-issues: *Held*,

(1.) The Court has power to vacate the interlocutory decree;

(2.) The right to re-issue the Pipo patent was lost by the delay of more than 12 years, the case being one of a mere expansion of the claims beyond anything stated in the original patent as the invention, and with no proof of mistake or inadvertence, and it being sought to make the new claims embrace structures brought into use between the time of the issue of the original patent and the time of the application for the re-issue, and which were not infringements of the claim of the original patent; and the re-issue was invalid as to claims 1, 7, 8 and 10;

(3.) In the Robjohn re-issue, new matter was introduced, and the re-issue was taken to cover devices which did not infringe the original patent, and was invalid as to claims 8 and 9. *Wooster v. Handy*, 307

68. The bill was dismissed. *id.*

(14.) *Celluloid Mfg. Co.—Piano-key.*

69. Claim 1 of letters patent No. 210,780, granted, December 10th, 1878, to the Celluloid Manufacturing Company, assignee of John W. Hyatt, for

- an improvement in the manufacture of piano keys, namely, "1. As a new article of manufacture, a blank keyboard covered with a continuous strip or roll of plastic composition, substantially as specified," is a valid claim. *Celluloid Mfg. Co. v. Pratt*, 367
70. The invention consisted in covering the entire upper surface of the keyboard with a sheet of celluloid, fastened to the wood with the usual celluloid cement, and was patentable. *id.*
71. It is an infringement of claim 1 to cover a substantial portion of the upper surface of the keyboard with a single sheet of celluloid, but it is not an infringement to cover single keys with separate strips of celluloid. *id.*
- (15.) *Matthews—Soda-water fountain.*
Matthews—Soda-water apparatus.
Matthews—Vessel containing gas under pressure.
Matthews—Fountain containing aerated beverage.
72. Claims 1, 2 and 3 of re-issued letters patent No. 8,834, granted to John Matthews, August 5th, 1879, for an "improvement in soda-water fountains," on an application for re-issue filed June 26th, 1879, the original patent, No. 128,411, having been granted to said Matthews, June 25th, 1872, for 17 years from June 13th, 1872, namely, "1. The combination of the inner continuous tin fountain, A, having neck, *b*, with the rigid inclosing shell, made in sections, substantially as herein shown and described. 2. The tin vessel, A, inclosed by a cylinder, C, and ends, BB', in the manner substantially as described, as a new and improved article of manufacture, for the purpose specified. 3. The combination of the inner vessel, A, with the exterior covering, made in sections, which are united after being placed around the vessel, A, substantially as specified, the inner vessel being entirely continuous within the covering," are invalid. *Matthews v. Iron Clad Mfg. Co.*, 427
73. The text of the specifications of the original patent and the re-issue was the same; the original had one claim, namely, "The tin vessel, A, incased by a steel cylinder, C, and ends, BB', soldered to the latter, in the manner substantially as described, as a new and improved article of manufacture, for the purpose specified;" the invention set forth in the original patent was a structure having these features: (1) a tin vessel or lining, A; (2) incased by a steel body or cylinder, C; (3) the outer end caps or ends, BB', soldered to the steel body or cylinder, C, without flanges or projections, by tin joints, made by soldering with pure tin, instead of by a solder having lead in it; the claim was adequate to secure that invention; there was no inadvertence, accident or mistake; the first three claims of the re-issue, by omitting all limitation to the method of soldering, enlarge the invention and the claim, so as to cover structures which came into existence after the original patent was granted, and before the re-issue was applied for; it was applied for seven years after the original was granted, and, during that interval, the defendant engaged in making the alleged infringing structures; and they did not infringe the claim of the original patent. *id.*
74. Claim 1 of re-issued letters patent No. 8,837, granted to John Matthews, August 5th, 1879, for an "improvement in soda-water apparatus," on an application for re-issue filed June 26th, 1879, the original patent, No. 137,702, having been granted to said Matthews, April 8th, 1878, namely, "1. The combination of the cock A, having recessed flange *a*, and packing *x*, in the recess, with the bung C, and shell or body D, of the fountain, substantially as herein shown and described," considered. *id.*
75. The invention covered by that claim was on sale more than two years before the application for the original patent. *id.*
76. The five claims of letters patent No. 159,433, granted to John Matthews, February 2d, 1875, for an "improvement in vessels containing gases and liquids under pressure," considered. *id.*
78. The text of the specifications of the original patent and the re-issue was

77. The first four claims of that patent are not infringed by a structure which is not a lamellar vessel, and has no lamellar cap or end, and no cap or end made by sweating together a number of caps coated with a soldering metal, but only has reinforcing washers at the end where there is an aperture. *id.*
78. As to claim 5 of that patent, namely, "5. The combination of the reinforcing washers *d* with the end or body of the vessel, so as to re-enforce the parts weakened by apertures, as set forth," the state of the art was such, that there was no invention in applying a re-enforcing washer to an aperture in a structure like the defendant's; and such a washer as the defendant's existed substantially before Matthews' invention. *id.*
79. Moreover, the invention was extensively used by Matthews, in his regular business, more than two years before he applied for the patent. *id.*
80. Claim 1 of letters patent No. 179,583, granted to John Matthews, July 4th, 1876, for an "improvement in fountains containing aerated beverages," namely, "1. A metallic bung, provided with a recess, *c*, in combination with faucet, *e d*, substantially as described," is not infringed by a structure which has no washer in the bung casting, nor any recess for a washer; and, as a washer in a recess in a cock, to pack a joint, existed before, it hardly amounted to a patentable invention to change the position of the recess from the cock to the bung, there being no other result than convenience. *id.*
81. Claim 2 of that patent, namely, "2. In a fountain, a lining carried over the inner face of a metallic bung, and soldered thereto, substantially as shown, so as to protect the bung against corrosion, as set forth," does not, in view of the state of the art, claim a new or patentable invention. *id.*
- (16.) *Spill—Dissolving xyloidine.*
Spill—Manufacture of xyloidine.
82. Letters patent, No. 97,454, granted to Daniel Spill, November 30th, 1869, for an "improvement in dissolving xyloidine for use in the arts," are invalid, for want of novelty, as to the claim for the preparation and use of camphor in conjunction with alcohol or spirits of wine, as a solvent of xyloidine. *Spill v. Celluloid Mfg. Co.*, 441
83. The 2d claim of letters patent, No. 101,175, granted to Daniel Spill, March 22d, 1870, for an "improvement in the manufacture of xyloidine and its compounds," namely, "The process of bleaching xyloidine in the manner herein specified," rests only on the fact, that Spill discovered that xyloidine could be bleached by ordinary bleaching materials. But he merely applied the old process of bleaching by ordinary bleaching agents, to vegetable fibres, with no change in the manner of application, and with the same result; and this was not a patentable invention, in view of the state of the art, and of the decision in *Pennsylvania R. R. Co. v. Locomotive Engine Safety Truck Co.*, (110 U. S., 490.) *id.*
- (17.) *Hayes—Ventilating louver.*
84. Claims 1 and 5 of letters patent, No. 170,852, granted to George Hayes, December 7th, 1875, for an improvement in ventilating louvers, are invalid. *Hayes v. Bickelhaupt*, 463
85. Claim 1 is a claim for a louver, consisting of the combination of an outer reticulated covering, with curved slabs, called gutters, within; and claim 5 is for the gutters themselves. The covering and gutters together form an aggregation, and not a patentable combination, and there was no patentable invention in putting the two together for uses for which each was before well known separately. The use of the flanges was only the result of good workmanship. *id.*
- (18.) *Holmes and Roome—Electric lining for safe.*
86. Letters patent No. 120,874, granted to Edwin Holmes and Henry C

Roome, November 14th, 1871, for an improvement in electric linings for safes, are valid. *Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co.*, 471

87. There was invention in making an electric lining to an outer covering for a safe, insulated from the safe, and so arranged that an attempt to get through the covering will affect the electrical conditions, and thereby give an alarm, although the outside of houses and other buildings and rooms had before been electrical-ly protected. *id.*

88. Under § 4,887 of the Revised Statutes, the term of a patent here is to be as long as the remainder of the term for which a prior foreign patent was granted, even though the latter patent has been suffered to lapse for non-payment of tax. *id.*

(19.) *Franklin Electric Gas Lighting Co.—Electric apparatus for lighting street-lamp.*

89. In re-issued letters patent No. 9,748, granted to the Franklin Electric Gas Lighting Company, assignee of Jacob P. Tirrell, June 7th, 1881, for electrical apparatus for lighting street-lamps, the original patent, No. 130,770, having been granted August 20th, 1872, and the specifications of the original and the re-issue being precisely alike, what is claimed in claims 2 and 5 was not claimed anywhere in the original patent, as a part of the invention; that patent stood nearly nine years before those claims were made; the right under which the defendants operate had accrued before they were made; and those claims are invalid. *Electric Gas Lighting Co. v. Tillotson*, 481

(20.) *Bell—Telegraphy.*
Bell—Telephone.

90. Letters patent granted to Alexander Graham Bell, No. 174,465, March 7th, 1876, for "improvements in telegraphy," and No. 186,787, January 30th, 1877, for "improvements in electric telephony," are valid. *American Bell Telephone Co. v. People's Telephone Co.*, 581

91. Bell, and not Daniel Drawbaugh, was the inventor of the electric speaking telephone. *id.*

92. The claims of Drawbaugh considered with reference to these facts: (1) His failure to apply for a patent for the telephone, for 10 years; (2) His want of veracity, as a witness; (3) His want of acquaintance with electrical science; (4) His failure to bring a telephone into use. *id.*

PLEADING.

See AGREEMENT, 1.
CORPORATION, 1, 4.
PATENT, 20, 22.
PRACTICE, 4, 7.

PRACTICE.

1. Where, at the time a suit is removed from a State Court of New York, into this Court, by the defendant, under the Act of March 3d, 1875, (18 U. S. Stat. at Large, 470,) his examination under the Code of Civil Procedure of New York, as a witness, at the instance of the plaintiff, before trial, is pending, under an order of the State Court, the plaintiff has a right to proceed with the examination pursuant to the order. *Fogg v. Fisk*, 29

2. As a pending case, presenting the same question, involved a sufficient sum to be reviewed by the Supreme Court, and was to be presented to that Court, this Court, both judges concurring, stayed all proceedings in this case, and refrained from entering a judgment, until the decision in the other case, on writ of error, or until the further order of this Court. *Rich v. Town of Mentz*, 85

3. In a suit in equity for the infringement of a patent, there was an interlocutory decree for the plaintiff, and an injunction, a settlement, a license, and payment for a release. Afterwards the defendant applied for a rehearing, on the ground of newly discovered evidence. The application was denied, on the ground of laches. *Colgate v. Western Union Telegraph Co.*, 118

4. In a suit in equity brought under § 4,918 of the Revised Statutes, to determine a question of interference between two patents, where the defendant sets up, by plea, that the plaintiff's patent is void for want of novelty, and the plea is overruled on the ground that, in a proceeding under § 4,918, the plaintiff's patent cannot be attacked for want of novelty, the defendant will not be allowed to set up afterwards, in an answer, the matter contained in the plea. *Pentlarge v. Pentlarge*, 120
 5. After a final hearing on pleadings and proofs, and a decision in favor of the plaintiff, in a suit in equity for the infringement of a patent, the defendant applied for leave to amend the answer and for a rehearing, in order to set up a new defence of prior use. It did not appear that the facts constituting the new defence could not have been discovered, by reasonable diligence, before the hearing. The facts showing diligence were not specified, but the conclusion only was alleged. The application was denied. *Hicks v. Otto*, 122
 6. In a suit in equity on two patents, the testimony being closed as to one, and the cause set down for hearing, if the plaintiff desires to discontinue the suit as to that patent, he will be allowed to do so on the condition, to be inserted in the decree, that the evidence taken by the defendant in relation to that patent may be stipulated into any future suit upon the same patent by the plaintiff against the defendant. *Brush v. Condit*, 246
 7. A motion by the respondent, in a suit in Admiralty in the Circuit Court, to amend the answer, so as to set up, as a ground of defence, the law of Great Britain, enabling ship-owners to exempt themselves, by express contract, from liability for loss of goods carried by their ships, arising from negligence, was denied, on the ground that, under Rules 3 and 4 of the Circuit Court, the written appeal by the respondent had not stated that it was intended, on the appeal, to make new allegations. *Phoenix Ins. Co. v. Liverpool and Great Western Steamship Co.*, 372
 8. In an action at law, where it was far from clear that the plaintiffs were entitled to recover, and the Court had, with grave doubt, directed a verdict for them for over \$5,000, an application by them to remit part of the verdict, so as to reduce it below \$5,000, and thus prevent a review by the Supreme Court, on a writ of error, was refused. *Rogers v. Boserman*, 462
 9. In a patent suit, in equity, founded on two patents, the plaintiff, at the hearing, withdrew one of them, and had a decree on the other. The defendant applied for a rehearing, on the grounds, (1) that he supposed the main reliance was on the patent withdrawn; (2) that the defendant supposed the patent that was sustained, to be invalid; (3) that important considerations as to that patent had failed to come to the attention of the Court: *Held*, that a rehearing must be denied. *Everett v. Buffalo Lubricating Oil Co.*, 524
- R**
- RAILROAD.**
- See* BILL OF LADING, 3, 4.
BOND.
CORPORATION, 3.
EXPRESS COMPANY.
MORTGAGE.
RECEIVER.
TELEGRAPH COMPANY.
- RECEIVER.**
1. Where a railroad corporation, with its well-known obligations to the public, has become entirely insolvent and unable to pay the interest upon its secured debts, unable to pay its floating debt, unable to borrow money, and is in peril of the breaking up and destruction of its business, and confesses this inability, a case has

arisen where, upon a bill filed by a mortgage bondholder, for an injunction against attacks upon the mortgaged property and a receivership to protect the property of the corporation against peril, a temporary receiver may be appointed, although no default has yet taken place on the securities owned by the plaintiff, but a default is imminent and manifest. *Brassey v. N. Y. & New England R. R. Co.*, 72

2. The receivership in this case was not the result of any plan to injure the corporation or the holders of its securities, nor was the suit collusive between the parties, in the sense of a fraudulent collusion to deceive the Court, and thereby to accomplish selfish and improper purposes. *id.*

REHEARING.

See PRACTICE, 3, 9.

REMOVAL OF CAUSE.

1. To authorize the removal of a suit from a State Court, under subdivision 3, of section 639, of the Revised Statutes, the requisite diversity of citizenship must exist both when the suit was begun and when the petition for removal is filed. *Freelinghuyzen v. Baldwin*, 1
2. A citizen of New York brought a suit, in a State Court, against a corporation of New Jersey and two corporations of New York, claiming to be a creditor, without judgment, of the New Jersey corporation. The complaint prayed that certain real estate alleged to have been paid for by that corporation, when insolvent, and conveyed directly to one of the other corporations, in fraud of the plaintiff's rights, be sold to satisfy his claims, and that the defendants be restrained from disposing of or encumbering the land. No judgment was asked for against the New Jersey corporation: *Held*, that this Court could not entertain jurisdiction of the case, by a removal of the suit by the New Jersey corporation, under clause 2 of section 2 of the Act of

March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) because there was no separate and distinct controversy, which could be fully determined, between the plaintiff and the New Jersey corporation. *Moore v. North River Construction Co.*, 115

3. In an interpleader suit, in equity, brought by a life insurance company against different persons claiming to own a policy issued by it, one of the defendants removed the suit into this Court, under clause 2 of § 2 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) alleging, in his petition, that the policy was his property. Another defendant moved to remand the cause, on the ground that there was but a single controversy in the suit, and that in that case a removal could be had only under clause 1 of § 2, and then only when all the plaintiffs or all the defendants should unite in the petition: *Held*, that the motion must be denied. *Mutual Life Ins. Co. v. Champlin*, 334
4. Subdivision 3 of § 639 of the Revised Statutes is not repealed by the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470.) *Melendy v. Currier*, 503
5. The time of removal under that subdivision is not regulated by the Act of 1875; and a cause may, under that subdivision, be removed, after it has been once tried in the State Court and a new trial has been granted. *id.*

See PRACTICE, 1.

S

SALE.

1. An order, addressed to the defendant, read thus: "Messrs. C. P. Harris Mfg. Co. Order No. —. Send to C. W. S. Banks, of 59 South St., Baltimore, Md. Terms, net 30 days, freight allowed. M. D. Berry, Agent." Then followed a list of goods, with prices, and "to be shipped after two months from date of this order." The order was in duplicate. Banks signed it at the foot. Berry

represented the defendant. He sent one order to the defendant, and left one with Banks, and himself kept a copy of the written parts. The defendant refused to send the goods. In a suit for their non-delivery: *Held*, that there was no sufficient memorandum in writing of a bargain of sale, to charge the defendant, within the statute of frauds, 29 Car. 2, c. 3, in force in Maryland, where the order was signed. *Banks v. Charles P. Harris Mfg. Co.*, 108

2. In an action to recover damages for a breach of warranty as to quality, on the sale of steel to be used in making vises, the warranty and the breach being established, the Court ruled that the plaintiff owed no duty to the defendant to test the steel before using it, and that there was no evidence to authorize the jury to find that the plaintiff discovered the defect in the steel before using it: *Held*, that this ruling was correct. *Bagley v. Cleveland Rolling Mill Co.*, 342

3. When a vendor agrees to fill an order for an article of a particular quality, his liability is the same as when he first makes a proposal to sell an article of that description. *id.*

4. The defects in the steel not being obvious on inspection, but latent, the use of it by the plaintiff did not affect his right of recovery for damages, it not being shown that he knew of the defects till he had used the steel and sold the vises made from it. *id.*

5. The proper damages were the cost of labor and the waste of material employed in making the vises, with interest from the commencement of the suit. *id.*

SHIP-OWNER

See NEGLIGENCE, 1.

SHIPPING COMMISSIONER.

1. The question considered, whether the salaries paid by the Shipping Commissioner of the Port of New York to his deputies, for the year

1882, were reasonable. *In re Accounts of Shipping Commissioners*, 148

2. A salary of \$3,648 to each of three sons of his, as a deputy, held not to be reasonable. *id.*
3. The administration of the office by the Shipping Commissioner reviewed, and the conclusion reached, either that he was so blinded by parental interests that he could not exercise an intelligent judgment respecting the economical and decorous administration of his office, or that he corruptly exercised his powers and opportunities, to farm out its revenues, as spoils for family distribution. *id.*
4. Regulations made as to the number of clerks to be employed, and their salaries. *id.*
5. The Commissioner ordered to show cause why he should not be removed from office. *id.*

STATUTE.

See DUTIES, 2.

STATUTE OF FRAUDS.

See SALE, 1.

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1883, chap. 345, Validating Assessment,	302, 304
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Revised Laws, § 762, Party,	493
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13 Elizabeth, chap. 5, Fraudulent Conveyance,	495
27 Elizabeth, chap. 4, Fraudulent Conveyance,	493
29 Car. 2, c. 8, Statute of Fraud,	104

QUEBEC.

43 and 44 Vict., chap. 43, sec. 59, cl. 3, Railway Co.,	528
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STREET.

See NEW YORK CITY.

T

TARIFF.

See DUTIES.

TAX.

1. The curative Act passed by the Legislature of New York, (*chap. 345, Laws of 1883,*) to validate void tax assessments made by the assessors of the city of Albany, in the years 1876, 1877 and 1878, on shareholders in a national bank, is valid. *Williams v. Board of Supervisors,* 302
2. The fact that the tax payers have not been given an opportunity to be heard until after paying their taxes, does not make the Act invalid. *id.*

See INTERNAL REVENUE.

TELEGRAPH COMPANY.

1. An agreement whereby a railroad company, "so far as it legally may," grants to a telegraph company an exclusive right of way along its line, and agrees not to furnish any competing line any facilities which "it may lawfully withhold," will be interpreted as granting only such an easement as is necessary for the legitimate use of the telegraph company in constructing and operating its lines, because otherwise it would contravene the Act of Congress, of July 24th, 1866, (14 *U. S. Stat. at Large*, 221.) *Western Union Tel. Co. v. National Tel. Co.,* 108
2. The telegraph company will be protected, by injunction against the railroad company, in the possession of a line of telegraph which it has constructed. *id.*
3. An injunction to restrain a proposed breach of a contract was refused. *id.*

THEATRE.

See AGREEMENT, 1.

TOWN BOND.

See MUNICIPAL BOND.

TRADE-MARK.

1. One J., of England, published a series of books called the Chatterbox, and assigned to W. the exclusive right to use that name in the United States, for ten years. E. afterwards published a series of books by that name, so similar in appearance and style as to lead purchasers to think they were the books of J: *Held,* (1.) The rights of J. were violated, although there were publications by the same name, earlier than those by J.; (2.) The rights of J. were assignable to E. *Estes v. Williams,* 364
2. Where a trade-mark is registered under the Act of March 3d, 1881, (21 *U. S. Stat. at Large*, chap. 138, p. 502,) an injunction to restrain its use will not be granted as to mineral waters not intended to be transported to a foreign country, nor for any Indian tribe, but sold for consumption in the city of New York, and where the parties to the suit are all citizens of the State of New York. *Luyties v. Hollender,* 413
3. The question of the right to use the name, "Goodyear's Rubber Mfg. Co.," as between two corporations, considered, and decided in favor of the plaintiff, such name being conceded by both parties to be practically identical with the plaintiff's name. *Goodyear Rubber Co. v. Goodyear's India Rubber Glove Mfg. Co.,* 421

TREATY WITH CHINA.

See CHINESE.

TRIAL.

1. It is the duty of the Court to direct a verdict for the plaintiff, when the evidence is such that it would be its duty to set aside, as contrary to the evidence, a verdict for the defendant. *Bagley v. Cleveland Rolling Mill Co.,* 342
- See CIRCUIT COURT, 1 to 7.*
EVIDENCE, 7.

TRUST.

1. B., in his lifetime, delivered and transferred to L. bonds, under written agreements between them; one, that L. should hold the bonds in trust to pay the interest to B. during his life, and, at his death, to transfer them to persons named; the other, that L. should hold the bonds for the benefit of persons named, at the death of B., reserving to him the right to demand and have the income while he should live, and to revoke the trust and have the bonds returned to him, if he should so elect. L. paid the interest to B. during his life. B. did not revoke the trust, but died leaving the bonds in the possession of L.: *Held*, that the bonds were no part of the estate left by B. at his death. *Barlow v. Loomis*, 106

V

VERDICT.

See TRIAL.

VESSEL.

See BILL OF LADING, 1 to 4.
CARGO.
CHARTER-PARTY.
LIEN.
NEGLECT, 1, 2, 5.

W

WAIVER.

See BOND.
MASTER IN CHANCERY, 1.

WARRANTY.

See SALE, 2 to 5.

WATER-RIGHT.

1. The rights of the Connecticut River Company, in respect to obstructing the flow of the water of the Connecticut River, in the State of Connecticut, for the purpose of improving its navigation, examined and defined. *Holyoke Water Power Co. v. Connecticut River Co.*, 131
2. The effect of the structures already made by that company in the river examined, and held not to be injurious to the works of the Holyoke Water Power Company, in Massachusetts, and not to be the cause of legal damage. *id.*
3. The carrying of the obstruction of the flow of the water to a greater extent than now would cause pecuniary injury to the Holyoke Company, and must be enjoined, because Connecticut has no right to authorize such obstruction, with such effect on the works of the Holyoke Company, in Massachusetts. *id.*

WHARF.

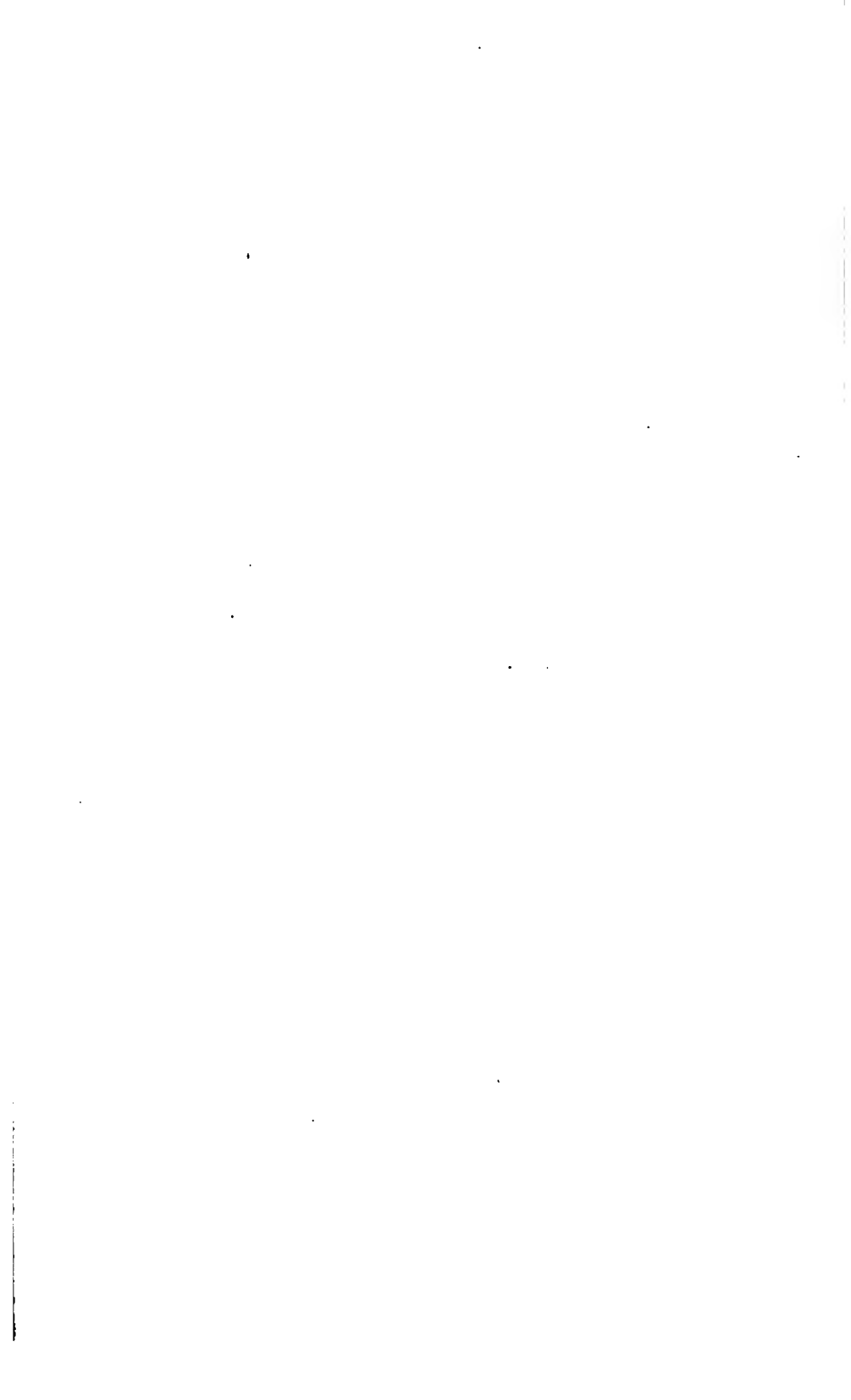
See NEW YORK CITY.

WITNESS.

See PRACTICE, 1.

WRIT OF ERROR.

See CIRCUIT COURT, 1 to 7.













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